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THE LAW
OF
LIMITATION

AS TO

Real Property :

INCLUDING THAT OF

THE CROWN AND THE DUKE OF CORNWALL.

WITH

APPENDIX OF STATUTES.

BY WILLIAM BROWN, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

Interest reipublicæ ut sit finis litium; 6 Co. Rep. 9a, 45a; ne . . . lites immortales essent, dum litigantes mortales sunt.—J. VOET, Ad Pand. v., 1, 58.

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PREFACE.

THE matter of this Volume and the arrangement of the subject are indicated by the title page and the Table of Contents.

As an introduction to Prescription at Common Law and the Statutes of Limitation, a general view of Prescription, in its most extensive signification, of the rise and progress of the statute law of limitations, and of Possession as respects real property, is given.

The Statutes regulating the time of limitation for the Possessions of the Sovereign, and of the Duke of Cornwall exclusively, are separately considered.

The statutes 2 & 3 Will. 4, cc. 71, 100, although differing in their operation from the ordinary Statutes of Limitation, are essentially of that nature; and have placed on a different basis the rights to which they are applied; and, being of a remedial character, a general view of Prescription at Common Law is also given.

Fisheries, subjects of daily increasing importance, especially *several* fisheries, when and how far they involve the ownership of the soil, and can be claimed by Prescription at Common Law, are investigated at some length.

Although the Author has spared no labour in this work, some matters may have escaped his attention. For these, which he hopes are few, he asks the indulgence, and relies on the generosity, of the Profession.

October, 1869.

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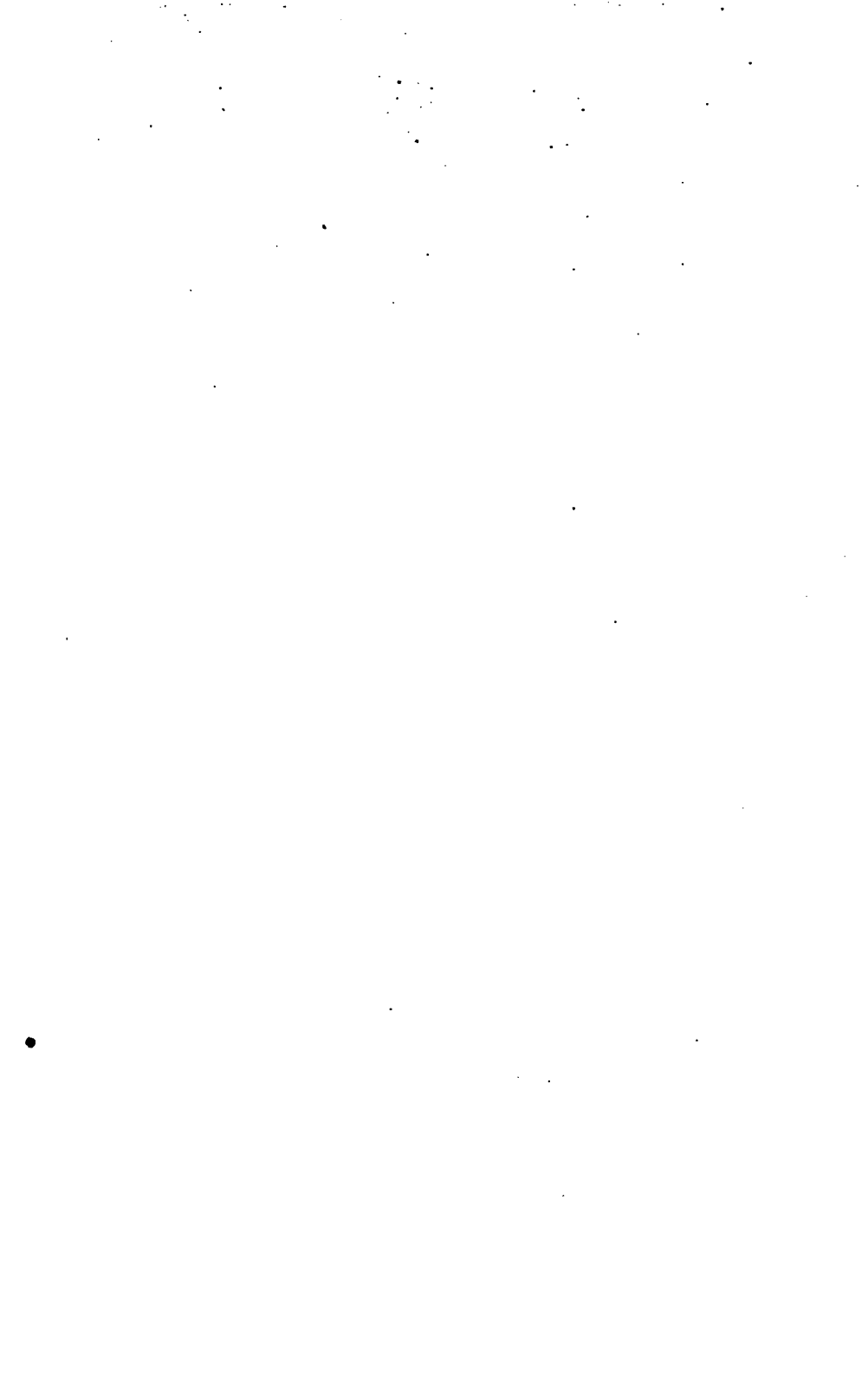
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ADDENDA.

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- 18, n. (s).—Perhaps, however, a contract to pay within the time fixed by the law of the land, where the contract is made, may be valid. See judgment of Cockburn, C. J., *Harris v. Quine*, 17 W. R. 967; 20 L. T. R., N. S. 947, *S. C.*
- 20, n. (h).—See judgment of Tindal, C. J., *White v. Prickett*, Arnold's Rep. 61, 62; 4 Bing. N. C. 237, 240, *S. C.*
- 28, n. (p).—*Harris v. Quine*, 17 W. R. 967; 20 L. T. R., N. S. 947, *S. C.*
- 127, n. (f).—6 Taunt. 621.
- 128, n. (m).—1 H. & N. 744; *Chapman v. Jones*, 17 W. R. 920.
- 150.—The franchise of free warren, at least when it does not include the soil, may be claimed by prescription; Co. Litt. 114 b.; or, as in the case of a several fishery, when the franchise includes the soil, and the soil can be considered as a mere adjunct. A grant of such a franchise sometimes includes, sometimes excludes, the soil. See *Rice v. Wiseman*, 3 Bulstr. 82; Co. Litt. 5 b.; Shep. Touch. Prest. 96; *Earl Beauchamp v. Winn*, 17 W. R. 866.
- 150, nn. (g, t).—*The King v. Mayor of Stratford-on-Avon*, 14 East, 348, 362.
- 151, n. (z).—There is, however, great difference between an aisle and a seat in an aisle. The seat may be since the foundation of the church. 1 Keb. 370.
- 177.—It would seem that a several fishery in a tidal river is not lost or extinguished by mere non-user, and open to the public again. *Mayor of Carlisle v. Graham*, Exch., Trin. Vac. 1869, not yet reported.
- 179, n. (g).—So a grant of free warren of a particular kind, as conies, would not include the soil. *Earl Beauchamp v. Winn*, 17 W. R. 866.
- 190.—The grant of "The A— Fishery" is not for any particular sort of fish, and is equivocal. The fishery may be a free fishery or a common of fishery, or a several fishery; and by extraneous evidence before a proper tribunal the nature of it may be satisfactorily determined; but until that is done, is an undefined right; and the owner, whenever the occasion arises, must ascertain the specific character of the fishery. See *Gore v. M'Dermott*, Ir. Rep., 1 C. L. 348; *Re Acheson's Estate*, *ib.*; 3 Eq. Ca. 105.
- 191, n. (u).—On this case, see *Gore v. M'Dermott*, 1 Ir. Rep., C. L. 359, 360.
- 195.—When a tidal river, wherein is a several fishery, changes its course, passing through the land of a subject, and not that of the Crown, the fishery is not transferred into the new channel. *Mayor of Carlisle v. Graham*, *sup.*
- 328, n. (t).—See ADD. to p. 150, *sup.*
- 362, n. (a).—In the case of *The Mayor of Carlisle v. Graham*, *sup.*, Bramwell, B., expressed an opinion that the several fishery in question was not within any Statute of Limitation.
- 369, n. (g).—But although a pew must be attached to a house, yet a chapel on the soil and freehold of the owner need not. Sid. 88; *Chapman v. Jones*, 17 W. R. 920; 20 L. T. R., N. S. 811, *S. C.*
- 447, n. (g).—*Smith v. Stocks*, 20 L. T. R., N. S. 740.
- 462, n. (t).—But see *Re Phano's Trusts*, 17 W. R. 1078.

CORRIGENDA.

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- 20, n. (h).—*Add*, 1 Coop. Rep. Ch. temp. Lord Cottenham, 189.
 28, n. (m).—*Fbr* "Polwd." *read* "Plowd."
 117, n. (v).—*Fbr* "Small" *read* "Smales."
 128, n. (k).—*Fbr* "Sticker" *read* "Stocker."
 182, n. (x).—The same.
 136, *second line upwards*, for "to us a" *read* "to us as a"
 143, *line 14*, *dele* "as against the Crown."
 149, n. (a).—*Fbr* "Northampton" *read* "Nottingham."
 209, *commencement of the first line*, *read*, "As to."
 236, n. (g).—*Fbr* "c. 47" *read* "c. 42."
 324, n. (p).—*Fbr* "c. 28" *read* "c. 26."
 325, *2nd marg. ab.*; for "affected" *read* "protected."
 367, n. (k), 368, n. (o).—*Fbr* "Wangh" *read* "Waud."
 405.—*Fbr* "52 H. 8, c. 9" *read* "32 H. 8, c. 2."
 406, n. (a).—*Fbr* "c. 4" *read* "c. 24."
 424, n. (e).—*Fbr* "7" *read* "6 & 7."
 „ —*Fbr* "18 Car. 2" *read* "17 & 18, c. 2, s. 158."
 427.—*Fbr the 8rd marg. ab.*, *read* "The right must be lawfully claimable."
 428.—*In the first marg. ab.*, after "and" *read* "the enjoyment of it be."
 460, n. (k).—*Fbr* "H. 4" *read* "H. 7."
 492.—*Line 15 from the top*, *dele* "where."
 499, n. (p).—*Fbr* "Phillips v. Mannings" *read* "Phillipo v. Munnings."
 505, n. (s).—*Fbr* "2 Swanst." *read* "3."
 510, *marg.*—*Fbr* "sect. 27" *read* "26."
 524.—*Fbr* "18 Car. 2" *read* "17 & 18, c. 2, s. 158."
 528, n. (a).—*Fbr* "Stamford" *read* "Stanford."
 548, n. (o).—*Fbr* "Rockfort" *read* "Rochfort."
 564, n. (o), 568, n. (e).—*Fbr* "c. 21" *read* "c. 16."
 570, n. (u).—*Fbr* "8 & 9" *read* "7 & 8."
 592, n. (d).—*Fbr* "c. 28" *read* "c. 38."
 610.—*Read the first marginal abstract opposite the next paragraph.*
 „ —*Read the second marginal abstract opposite the third paragraph.*
 626.—*Read the marginal abstract opposite the first paragraph in p. 627.*
 632, n. (e).—*Fbr* "Slackhouse" *read* "Stackhouse."
 638.—*Lines 13 and 14*, *dele* "a rent or."
 643.—*Fbr* "7 & 8 Vict. c. 76" *read* "8 & 9 Vict. c. 106."
 705.—*For third marginal abstract*, *read* "exemptions."
 723, n. (t).—*Fbr* "Rundall" *read* "Randall."

PRESCRIPTION

AND

TIME OF LIMITATION.

BOOK I.

PRESCRIPTION IN GENERAL.

CHAPTER I.

THE ORIGIN, THE OBJECT, AND THE MODE OF OPERATION, OF PRESCRIPTION.

SECTION I.

The Origin of Prescription.

MANKIND, before the establishment of civil society, are commonly supposed to have had, in general, all things in common. Civil society, however, being constituted, in however rude a form, the institution of property arises, and whatever may be the design or end of such society, order is essential to its very existence. For establishing and preserving this order the rights and duties of the individual members of such society require to be distinctly defined, and effectually maintained. In particular, the protection of those rights which arise from, or are connected with, the institution of property and the possession and the enjoyment of those things which are the objects of that institution, is a consideration of the first importance. And of all laws estab-

Importance
and benefit of
prescription.

lished for securing that protection, none perhaps are more important to, or exercise a more beneficial influence on, the order of society, the security of property, and, through these, the happiness of its members, than those laws fixing a limit to the times within which those rights, when either violated or neglected, are to be asserted. These laws are the great security to people in their rights and possessions; without them no person could scarcely call any thing his own, nor be safe against claims that were not heard of perhaps for hundreds of years, . . . and as they are a necessary remedy for ascertaining men's rights, so they are founded on natural equity. The presumption is, that one who possesses for a long course of time, possesses by a just right, and that the old proprietor was duly denuded. And that one who ceases to make use of his right for a long term of years has renounced it, or that there was nothing truly due to him, and the law has rendered this, *Præsumptio juris et de jure*. . . . These laws, in general, are founded in the nature of things, and conducive to the peace of mankind (*a*). In truth, the principle of legalizing possession, after a certain length of enjoyment, is the principle on which all property ultimately rests (*b*).

" 'Tis the prerogative of Time, to make
Whate'er he touches precious."

Universality
of this law.

Time, that old common arbitrator, the old justice, however, as such, says Grotius (*c*), has no power to produce anything, and nothing is done by time, though everything be done in time. But says Pufendorf (*d*), "no one can deny but that the consent of all nations, to which they were moved by the care of the common peace, might be able to assign some moral efficacy to

(*a*) 2 M'Donall, Inst. Laws of
Scotland, 182, 183.

(*b*) Per Lord Denman, 3 Gale

& D. 443.

(*c*) B. ii. c. iv. s. 1.

(*d*) B. iv. c. xii. s. 7.

the course of years, at least so far as that in process of time some certain presumptions and favours, on the side of persons in possession, should be granted to defend and confirm their right, though attributed to other causes than the bare time itself. For though pure natural reason, and the agreement of all the world, do not fix any one point of time as the necessary condition of obtaining a future right, yet they might allow this effect to a space of very considerable extent and latitude." And, after noticing the opinions of others as to the origin of this law, adds—"amongst these different opinions this seems to be clear and evident, that as the propriety of things was introduced out of a regard to the common peace, so it flows as a consequence from the same principle, that they who have been let into the possession of anything upon a fair and honest presumption, should, at length, be secured in the enjoyment of it; and that others should not be allowed to raise perpetual suits and quarrels about their title" (e). The same writer considers prescription as a corollary of property, and, by consequence, on property being first introduced, as being agreed upon by general consent for the sake of the public peace. Hence, in every civilized community, law of this nature, in a greater or less degree, has been established. "It has been found," as has been eloquently said, "in every part of the world, and in every civilized age. It was familiar to the old tribunals of Athens—it was an important part of the imperial jurisprudence—it was spread wherever the imperial power extended—it was recognized throughout Europe; and after the French revolution, when the French law was being reconstructed in the Code Napoleon, there appeared this principle of prescription. Go east or west you find it recognized. You find it

(e) *Puf. B. iv. c. xii. s. 9.*

recognized in tribunals beyond the Mississippi. Go to countries which never heard the name of Justinian, and into which no translation of the Pandects has ever found its way, and there you will find the principle recognized and established as a sacred principle of legislation. The Hindoos even acknowledge it as a principle of legislation. And as to our own country, this principle was introduced into our law when first our law existed. It is found in the Statute of Merton, one of the first of our written acts, an act standing in the statute book next to the Great Charter and the Forest Charter, and the principle has been carried on and extended, and the law has been made more stringent by a succession of great legislators and great statesmen down to our own time. We have seen it advancing nearer and nearer to its full perfection, and we have found that where there were particular parts left unguarded great oppression and gross evil have been the result. And when I look at a principle such as this—when I see it in the legislation of every civilized country—when I find that there is a perfect agreement between it and the great body of laws framed by our ancestors, and forming part of the Great Charter—when I find it in the time of Justinian, under the imperial authority, among the Greeks, and among the pundits of Benares—how is it possible for me not to believe that some universal sense of a great good and a great evil has led men, by perfectly distinct paths, to one and the same conclusion? Is it not perfectly clear that this principle of prescription is absolutely essential to the institution of property itself, that it rests on all the grounds on which property itself rests, and that if you take it away you produce the same kind of evil which is produced by a general confiscation? . . . Suppose you had no Statute of Limitations, so that any man amongst us might be liable to be sued on a bill

of exchange accepted by his grandfather in 1760; or suppose you imagine the case of a man, in possession of an estate occupying a manor-house which has been held by his grandfather and his great-grandfather before him, being turned out of that possession because some old will or deed, made in the time of Charles the First, has been discovered in some forgotten chest or cranny—should we not exclaim that it would be better to live under the rule of a Turkish pacha, and should we not all feel that the enforcement of an obsolete right was nothing less than an infliction of the foulest of wrongs? Should we not all feel that this extreme rigour of the law, without a limitation of time, would be nothing less than a grave systematic and methodical robbery?" (*f*) In short, take from time his charters, his customary rights, his sweet benefit, and chaos, social and political, follows.

Prescription, says Grotius (*g*), is established by municipal law. *Id quod nostrum est sine facto nostro ad alium transferri non potest*. What is ours cannot be transferred to another without our act (*h*), says the Roman Law. This maxim of that law is given by a late writer (*i*) as a maxim of *natural* law, but is plainly one of municipal law only, for the very terms of the maxim imply the existence of the institution of property, and therefore civil society. Municipal law, upon grounds of policy, deprives men of their property and transfers it to others by lapse of time and duration of adverse possession, because they have abandoned it, not willingly, but through error, ignorance or negligence. *Sed jus civile vigilantibus scriptum est*; and assuming that a limitation of time, within which men may assert their rights, is expedient and necessary, the rule of Paulus

Established
by municipal
law.

(*f*) Mr., afterwards Lord Ma-
caulay, in debate in the House of
Commons on the Dissenters' Cha-
pel Bill.

(*g*) B. ii. c. iv. s. 6.

(*h*) Dig. 50, 17, 11.

(*i*) Bow. Com. on C. L. 110.

applies,—*Propter privatorum commodum non debet communi utilitate præjudicari*,—and prescription is established *ne rerum dominia in incerto essent*, and because it is useful for the commonwealth that there should be some limit to litigation. It follows that though prescription is not without a foundation in natural law, it is in truth a mode of acquiring by municipal law (*i*).

The length
of the time.

Some maintain (*j*) prescription to proceed from *civil* and *positive law*, upon the strength of this argument, that in case a man hath not originally obtained a right on some other bottom, the bare length of time can give none, as being destitute of all power to produce any effect; for though every thing, say they, is done in time, yet time itself can do nothing: and then adds—as to the reason here proposed, thus much, indeed, is certain, that it depends wholly on the determination of positive law why prescription should be rather completed at the tenth or twentieth year, for instance, than at the ninth or the sixteenth.

The Roman
law the source.

The Roman law, “the fruit of the researches of the most learned men, the collective wisdom of ages” (*k*), is the source from which most of the nations of Europe have drawn the materials in framing their laws on this subject. And although that law forms no rule, binding in itself, upon the subjects of these realms; yet, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law (*l*).

In England
partly by the
common law
and partly
by statute.

In this country prescription is partly by the common law, and partly by legislative enactment. By prescription properly so called, that is, at common law (*m*), after an uninterrupted enjoyment of certain things incorporeal

(*i*) Bow. Com. on C. L. 110.

& W. 353.

(*j*) Puf. B. iv. c. xii. s. 7.

(*l*) *Ib.*

(*k*) Per Tindal, C. J., 12 Mee.

(*m*) Co. Litt. 113 a, *et seq.*

for a certain time, an absolute title to them is given to the persons who have had such enjoyment. By legislative prescription, or, as distinguished from prescription at common law, time of limitation (*n*), certain times, chiefly in relation to things corporeal, are prescribed, within which the persons, who when those times commenced were the rightful owners of such things, must assert their rights thereto, and after which times the persons in possession may suppose themselves to be in peaceable possession of the property, and capable of transmitting it without any apprehension of the title being impugned by litigation in respect of transactions which occurred at a distant period, when evidence in support of their own title may be most difficult to obtain (*o*).

SECTION II.

The Object of Prescription.

Men commonly lose their rights, not by a deliberate abandonment of them, but by negligence, or through error or ignorance. Sometimes their conduct is regarded as a tacit admission of their having no right. When, says Grotius (*p*), any one, knowing his property to be in the hands of another, permits a long period of time to elapse without claiming it, there is good ground for believing that he neglected to assert his claim because he no longer considered the thing as his property, unless there be other reasons excluding that inference. The Roman law said, with equal force and brevity, *videtur alienare qui patitur usucapi* (*q*). How rights are lost.

(*n*) Co. Litt. 114 b, 115 a.
(*o*) 3 Kay & J. 352.

(*p*) B. ii. c. ix. s. 5.
(*q*) D. 50, 16, 28.

Length of
enjoyment
evidence of
title,

It might at first sight be considered, that the duration of wrong ought not to give it a sanction, and that the long-suffering of injury should be no bar to the obtaining of right when demanded. But human affairs must be conducted on other principles. It is found to be of the greatest importance to promote peace, by affixing a period to the right of disturbing possession. Experience teaches us that, owing to the perishable nature of all evidence, the truth on any question of fact cannot be ascertained after a considerable lapse of time. The temptation to produce false evidence grows with the difficulty of detecting it; and at last, long possession affords the proof, the most safely to be relied upon, of the right of property. Independently of the question of right, the disturbance of property after long enjoyment is mischievous. It is accordingly found both reasonable and useful that enjoyment for a certain period of time against all claimants should be considered conclusive evidence of title. This period should be so fixed as to give ample opportunity to assert just rights, and yet not to countenance claims which have been long dormant (*p*). When property has been long in the possession of a family, has passed to children and grandchildren, and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. The members of the family from which it came, never having enjoyed it, suffer but little from its loss (*q*). Still, with a natural prejudice in favour of their own claims, or supposed claims, and unable to realize the beneficial influence and effect of laws protecting from disturbance such long possession, but looking to only the naked fact of their own expectations having been cut off, even where they may be at once

—and should
not be dis-
turbed.

(*p*) Real Property Commissioners' 1st Rep. 39.

(*q*) 1 Knapp, 227.

vague and remote, or barely possible, they would, in utter disregard of all such considerations as those suggested on behalf of the possessors, struggle to deprive them of the property. Happily, however, as well for those suffering, under the circumstances supposed, any such loss, as for the possessors of the property, this wise and beneficial law disregards those prejudices and expectations, protects the possessors, and thus secures the repose and the common weal of society.

In *Manby v. Bewicke*(*r*), a compromise had been made *Manby v.*
Bewicke. seventy-five years before, under which the ancestors of the plaintiff, whose only means of establishing their case were of a very doubtful character, acquired, on very slender evidence, and long enjoyed, a large benefit, and Wood, V.-C., said that no principle of morality or of justice required that such a contract, fairly and honourably entered into on both sides, should be rescinded, and that the plaintiff had been very unfortunate in attempting to set up claims of such a very stale character, after a contract had been thus concluded, and without any shadow of pretence for casting imputations on persons long since in their graves, which can hardly rest with them, but which must affect the character of every one who has been concerned from that time to the present in the preparation of deeds, assurances, wills and other documents under which this property has been dealt with. "So far from feeling," he also said, "that this is a case in which the statute has operated as any hardship to the claimant who fails in his litigation, I think it is just one of the cases which shows how beneficial this statute is, and how undesirable it is, even for claimants themselves, that they should nurture these strange and vague expectations eighty or ninety years after the supposed right which they claim first accrued, and when they find themselves, by the

prodigality of those who have preceded them, deprived of the fruits reaped by their ancestors from the compromise of a litigation concerning such supposed rights; and that they should set up these stale and antiquated demands and attempt to establish them in a manner so utterly reckless as in this case, by charging wholesale fraud of the grossest and most revolting character."

Prescription—
matter of
policy.

"Prescription is a thing of policy," said Wayne, J. (*s*), "growing out of the experience of its necessity; and the time after which actions or suits shall be barred has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction."

To remove
doubt and
suspense,

The principal aim and design of the law concerning prescription, says Pufendorf, are not to punish men's defaults in asserting their rights, but to provide that the State be not disturbed by uncertain titles and by properties in constant doubt and suspense (*t*). *Fundamentum et ratio præscriptionis est partim, quod negligentia domini merito puniatur, partim quod reipublicæ intersit, ne lites sint æternæ, neque dominia rerum semper incerta maneant* (*u*). *Ne lites*, as Voet, J., felicitously says (*x*), *immortales essent, dum litigantes mortales sint*. The primary object of this law is public utility, by preserving the quiet and repose of the State, and it accomplishes this preservation by preventing the rearing up of claims at great distances of time when evidences are lost (*y*); for the law has no other end but repose, and was ordained to put a stop to contention and to make peace (*z*), and also by preventing those innumerable perjuries which might ensue, if a man were allowed

—preserve
peace,

(*s*) 13 Curt. Am. Rep. 173.

(*t*) B. iv. c. xii. s. 6.

(*u*) Heinecc. by Hoepfner, s.
393, n.

(*x*) B. v. tit. 1, s. 53.

(*y*) 3 Bli. 17; 1 Macq. 321.

(*z*) Plow. 357.

to bring an action for an injury committed at any distance of time (*a*).

Upon every principle of sound policy, questions that have long been suffered to remain at rest ought not to be agitated. It is not the policy of the law to receive favourably claims that will disturb a possession enjoyed adversely for a long period. If a man be not reasonably diligent, what right has he to complain of the situation in which the law puts him? The quiet of the kingdom will be better preserved by not encouraging these stale demands (*b*); and, even where the claimant may be affected by personal disability, is more to be regarded than the private convenience of any particular person, whether he be an infant, or of unsound mind, or in other degree (*c*). It is true, says Pufendorf, that by a person's being denied to sue for recovery of his property, when he hath long neglected it, he suffers some loss or damage (*d*). But it is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands after the witnesses of the facts are dead and the evidence of the title lost. No hardship follows, except upon those who have slept over their rights in entire disregard of the provisions of a public act of the legislature (*e*). And such hardship is no other than is incident to every statute of limitations, which necessarily renders irrecoverable some demands which could otherwise be recovered—a hardship, if it be one, which is the very object of every such act to create (*f*). The individual hardship will, upon the whole, be less by withholding from one who has neglected the right, and never yet possessed, than to take away from the

—by quieting
possession,

(*a*) 3 Com. 308.

(*b*) 2 Jac. & W. 548, 556, 558.

(*c*) Plowd. 372.

(*d*) B. iv. c. xii. s. 6; 2 Ex.

Rep. 287.

(*e*) 10 Cl. & Fin. 333.

(*f*) 2 Jebb & Symes, 138.

other what he has long been allowed to consider as his own, and on the faith of which the plans in life, habits and expenses of himself and his family may have been unalterably formed and established (*g*). "I do not know," said Richards, C. B. (*h*), "anything more mischievous, in general cases, than to disturb a transaction of long standing. It is better, perhaps, that occasional injustice should be permitted than to run the risk of doing greater injustice by entering into the consideration of transactions which the distance of time may, perhaps, render incapable of a satisfactory explanation." And although an injustice may be said to be done to the party who has a good right, but which is barred by the statute, yet the balance of justice and convenience is found to be the other way (*i*), for long dormant claims have often more of cruelty than of justice in them (*j*). And it is the duty of all courts of justice to take care for the general good of the community, that hard cases do not make bad law (*k*). Nothing can be more wholesome for lawgivers than to adopt such measures as tend to quiet possession, to relieve the mind from alarm, and to enable parties, when time shall have destroyed the muniments of their titles, to retain the possession they have had for so long a time. Lord Plunket eloquently said, "Time with his scythe mows down muniments and evidence of title, and that therefore the mercy and the justice of the lawgiver placed in his other hand an hour-glass, by which he should, at the same time that he destroyed those muniments, measure out the periods of time which should quiet possession by becoming a substitute for the titles which he had destroyed" (*l*). The old maxim of law is *vigilantibus non*

(*g*) 2 Jac. & W. 139.

(*h*) Dan. Rep. 316.

(*i*) 2 Com. B. 771.

(*j*) 3 Bing. 333.

(*k*) 6 Moore, P. C. C. 254.

(*l*) See 1 Smythe's Ir. Rep. 536, 537; speech of Ld. Brougham in the debate in D. P. on the Dis-senters' Chapel Bill. See also 9 Ir. Eq. Rep. 471.

dormientibus inservit lex (m). People are not to sleep on their rights; it would be injurious to the public that they should. There must not be perpetual litigation on the subject of title. *Expedit reipublicæ ut sit finis litium*. Lands which are the subject of litigation become waste for want of cultivation, and therefore it has been a fundamental law of state policy in all countries and at all times, that there should be some limitation of time beyond which the question of title should not be agitated (*n*).

“Time, that takes survey of all the world,
Must have a stop.”

Laws of this nature are founded on the soundest principles and the wisest policy (*o*), are consonant to the municipal law of every country, and stand upon the general principle of public utility. The public have a great interest in having a limit fixed by law to litigation for the quiet of the community, a certain fixed period after which the possessor may know that his title and right cannot be called in question (*p*), nor his possession be disturbed, and in having full effect given to the statutes which have been passed for the purpose of protecting possession and quieting men in their rights (*q*), which is the principle upon which all statutes of limitation proceed, though doubtless at the expense of some individual mischief and loss; so that possession and enjoyment for a length of time may be looked to as the safest evidence of right (*r*). The policy of these laws is unquestionably this: possession is always regarded by the law as *primâ facie* title, not with a view to the benefit of individuals

(*m*) Plowd. 357; 2 Jac. & W. 139.

(*n*) 2 Sch. & Lef. 630.

(*o*) 1 Ball & B. 166.

(*p*) 2 Jac. & W. 139.

(*q*) 1 You. 18.

(*r*) 2 Ex. 287; 1 Mac. & G. 254; 2 C. B. 771.

who may be in possession or out of possession—who may have title, or who may not have title, but with a view to public benefit, because it is the public policy that possession should remain undisturbed. All the statutes for limitation of actions are expressly made for, and the great object of their policy is, the quieting of possession. It is generally immaterial to the public at large whether A. or B. is the owner of a particular estate; but it is highly important to the public at large that the person who is in possession should be the owner, for he is dealt with by all men as the owner, they seeing that he is in possession, and therefore it is a consideration of public policy. Those statutes are not simply for the purpose of quieting rights between individuals, but they are founded upon public policy, that the person who is in possession having the credit attributed to that possession, his possession should not be lightly disturbed (*s*). The intention of those statutes is to quiet the title to lands (*t*). The quiet and repose of the kingdom, the mischief arising from stale demands, the laches and neglect of the rightful holder, and all the other principles of public policy, take away the remedy, notwithstanding the title of the *veri domini* and the tortious holding of the possessor (*u*). In all well-regulated countries the quieting of possession is an important point of policy (*x*). It is of the greatest importance to the security of property and the peace of families that the fullest effect should be given to long possession and enjoyment. Accordingly, it has been the general rule for courts of justice in this country to endeavour to put an end to litigation, and various Statutes of Limitation have been passed, which

(*s*) 4 Bligh, 75, 117.

(*t*) 2 Sch. & Lef. 625.

(*u*) 2 Jac. & W. 155.

(*x*) 1 Macq. 321.

were intended to quiet possession, and more particularly so with respect to landed property, the title to which depends on written documents, and not parol testimony. If deeds were to be lost or destroyed it is impossible to say what great inconveniences might arise by permitting persons to lie by any length of time, and then make a claim (y).

The great reasons for the law of prescription have been said to be, 1st, for fixing and ascertaining property, the improvement of which must have been greatly neglected, and the minds of possessors laid under continual fear and anxiety, if they had been for ever exposed to the effect of obsolete claims which had not been heard of for a century of years backwards; 2ndly, for preventing forgeries, which must have been frequent, if deeds of the most ancient dates, though they had never been used, should have any legal effect given to them, as the difficulty of discovering the falsehood at a great distance of time, and consequently the hopes of impunity, would afford strong temptations to the commission of crime. This policy is not only profitable to society, but most consistent with the essential rules of government; for the supreme magistrate of every state hath an inherent power to limit the natural rights of his subjects by proper restraints, and to punish by forfeiture itself the negligence of proprietors when the great purposes of government demand it. Prescription is therefore grounded on the proprietor's relinquishing or abandoning his right; which the law takes for granted, or presumes, from his forbearing to exercise it for the whole term of prescription (z).

The object of prescription is, not to take property from the rightful owner, and to give a firm title to a person who has obtained it by wrong, but to strengthen

(y) 6 Moore, 561, 563.

(z) Ersk. Inst. L. Scot. 556.

titles by length of possession, and to give the property to those to whom it properly belongs; but inasmuch as the persons who are in possession may be defeated by others lying by, and then attacking them at a distance of time when their evidence may be imperfect, the law, for the purpose of securing the rightful owner, and not for the purpose of defeating his title, requires that the legal remedy shall be pursued within a certain time. In truth, while the tendency of time is to destroy evidence of title, a title becomes firmer as it grows older(*a*). The laws of this nature are intended, not for the punishment of those who neglect to assert their rights by suit—not to protect persons from claims fictitious in their origin, nor to enable *bonâ fide* debtors to escape payment of their debts(*b*)—but for the protection of those who have remained in possession under colour of a title believed to be good(*c*); to protect them from ancient claims, whether well or ill founded, or from satisfied claims, and from being harassed by stale demands, brought forward against them at a period when all their witnesses *might* reasonably be presumed to be dead, and when the circumstances of the plaintiff's having lain by so long without asserting his claim afforded fair ground for presuming that it had been abandoned(*d*). After a great lapse of time, it is impossible to get at truth so as to do justice upon any case. You have some documents, but you may not have all, that relate to the title, and those which are lost might be explained, or, perhaps, have done away entirely the effect of those which remain. Although some documents may be preserved, the witnesses necessary to make the account of

(*a*) Sir T. Wilde, Deb. Diss.

C. B.

(*b*) 5 Jur., N. S. 403.

(*c*) 4 Curt. Amer. Rep. 12.

(*d*) 4 C. B. 665.

the transaction complete, and fit for a decision, cannot (*f*):

*"Tempus edax rerum, tuque invidiosa vetustas,
Omnia destruitis."*

"One of the principal reasons," said Lord Cottenham (*g*), "for admitting limitations of suits, is the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power."

It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the act (*h*) to the last section, every word of it shows that it was not passed on this narrow ground. It has been often called, by great judges, an act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge (*i*). It is not a statute to protect parties against loss of evidence, but to quiet claims. To sue a defendant when the plaintiff has slept six years over his rights—when time and misfortune may have disabled the debtor from discharging his obligation—is at once iniquitous and anti-christian (*k*). These laws have the manifest tendency . . . to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate) applicable to such remote times, as may leave no means to trace the nature, extent or origin of the

(*f*) 1 Knapp, 227.

(*g*) 5 Myl. & C. 17.

(*h*) 21 Jac. 1, c. 16.

(*i*) 3 Bing. 332.

(*k*) Per Best, C. J., *Scales v. Jacob*, 3 Bing. 638, 653.

claim, and thus open the way to the most oppressive charges (*l*).

Time after which a contract cannot be enforced is not of its nature.

The time beyond which a contract cannot be enforced is not, as was argued in *Don v. Lippmann* (*m*), of the nature of the contract. That argument supposes that the parties contemplate the breach only of the agreement. "But nothing," said Lord Brougham, "is more contrary to good faith than such a supposition. If the law of the country proceeds on the supposition that the contracting parties look only to the period at which the Statute of Limitations will begin to run, it will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness" (*n*).

Advantage and application of this law in England.

Our own Statutes of Limitations have been, on all occasions, uniformly recognized as of great public concern and advantage, and are founded in favour of long possessions, for the repose of the subject, and to avoid uncertainties, which produce suits and contentions (*o*); and the object of them all is to give effect to the maxim, *interest reipublicæ ut sit finis litium* (*p*). They have been designated the best of statutes (*q*), noble beneficial acts (*r*), acts of peace (*s*), laws of peace and justice (*t*), a very beneficial system of laws and of the greatest importance, inasmuch as they are statutes of repose (*u*), and beneficial to the subject (*x*). So much importance, indeed, has always been attached to laws of this nature in our own country that they have been by degrees extended to all ranks and classes. True it is that they have been with us of slow

(*l*) 7 Curt. Amer. Rep. 618.

(*m*) 5 Cl. & F. 1.

(*n*) See also *Ex parte Kidd, In Re Kidd*, 3 De G., F. & J. 640.

(*o*) Jenk. Cent. Ca. 91, p. 48.

(*p*) 8 Moore, P. C. C. 21.

(*q*) Per Holt, C. J., 7 Mod. 12.

(*r*) Per Wilmot, J., 1 W. Bl. 287.

(*s*) Per Best, C. J., 3 Bing. 833.

(*t*) Per Lord Wynford, 1 Knapp, 227.

(*u*) Per Lord Kenyon, 4 T. R. 308.

(*x*) 2 Ves., J. 14.

growth, and have not sprung forth at once. The Crown and the Church were long exempt from these laws. The rule as to them was *nullum tempus occurrit regi aut ecclesie*; but in the reign of James the First (*y*), and again in the reign of George the Third (*z*), of William the Fourth (*a*), the law was extended to the Crown; and in the latter reign also (*b*) to the Duke of Cornwall and (*c*) the duchy of Lancaster. Again, in the reign of Her present Majesty (*d*), the law was still further extended as to the Duke of Cornwall. So also in the reign of William the Fourth (*e*) the law was extended to the Clergy; and again, in the present reign (*f*), to the Nonconformists, in relation to property devoted to certain purposes in conformity with their religious views. To this last extension of the law a stout but unavailing resistance, not only by the Nonconformists generally, but by many members of the Established Church, was offered. If, as was forcibly asked on the discussion of this extension, persons have been in possession for a long series of years of property devoted to the worship of the Supreme Being, and that worship has been carried on in a particular form, inculcating particular doctrines, why should not that establish a right as indefeasible as the right which is established in the particular cases just referred to (*g*)?

Again, in the reign of George the Third, the principle was applied to informations in the nature of writs of *quo warranto* for the exercise of any office or franchise in any city, borough or town corporate, exhibited by virtue of the royal prerogative (*h*). The act in its

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| (<i>y</i>) 21 Jac. 1, cc. 2, 14. | & 4 Will. 4, c. 27. |
| (<i>z</i>) 9 Geo. 3, c. 16. | (<i>f</i>) 7 & 8 Vict. c. 45. |
| (<i>a</i>) 2 & 3 Will. 4, cc. 71, 100. | (<i>g</i>) Per L. Lyndhurst, C., Deb. |
| (<i>b</i>) <i>Ib.</i> | D. C. B. |
| (<i>c</i>) 2 & 3 Will. 4, c. 71. | (<i>h</i>) 32 Geo. 3, c. 58. On this |
| (<i>d</i>) 7 & 8 Vict. c. 105; 28 & 24 | statute see <i>Rea v. Avtridge</i> , 8 T. |
| Vict. c. 53; and 24 & 25 Vict. c. | R. 467; <i>Rea v. Clarke</i> , 1 East, |
| 62. | 38; <i>Rea v. Richardson</i> , 9 Ib. 469; |
| (<i>e</i>) 2 & 3 Will. 4, cc. 71, 100; 8 | <i>Rea v. Stokes</i> , 2 M. & S. 71. |

preamble states that it would greatly tend to secure the quiet, tranquillity and good order of cities, boroughs and towns corporate if a reasonable limitation of time be established, beyond which the holder of an office or a franchise should not be disturbed in the enjoyment of it.

Policy and
effect.

Laws thus limiting suits are founded on the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds and to supply the deficiency of proofs from the ambiguity and obscurity of transactions. They presume that claims are extinguished because they are not litigated within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or laches of the party himself. They quicken diligence, by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times which are unexplained, and have now become inexplicable (i). The neglect of these salutary laws "would make every title throughout the kingdom shake, and conjure up a frightful group, a host of dark and fantastic suitors, to blacken its courts, and fill their air with novel and discordant sounds, uncouth to all learned ears, unintelligible to all learned minds, and involve the community, and all its real property, in a maze of groundless, endless, pitiless litigation" (k).

Morality of
using this law
as a defence.

The taking advantage of the statute law of limitations as a defence to a claim which in natural justice may appear to be well founded, may be considered by some persons as a violation of that justice and of morality. "But," says Paley (l), "if a man be ignorant or dubious of the justice of the demand made upon him, he may conscientiously plead this limitation, because he applies the rule of law *to the purpose for which it was*

(i) Story, Conf. of Laws, s. 576. nold's Rep. 322.

(l) Mor. and Pol. Phil. B. iii.

(k) Per Lord Brougham, Ar- part i. c. iv.

intended. But when he refuses to pay a debt, of the reality of which he is conscious, he cannot, as before, plead the intention of the statute and the supreme authority of the law, unless he could show, that the law *intended* to interpose its supreme authority to acquit men of debts of the existence and justice of which they were themselves sensible."

It has been said by an eminent writer on the laws of Scotland, "that where the right or ground of debt is wholly cut off . . . the other party may, without impeaching his conscience, take the benefit, in the same manner as if the former proprietor or creditor had relinquished or renounced their pretensions; because the right is discharged or extinguished by the public law to which all our rights are subject. And therefore it is absurd to term prescription an impious defence, since it is equally just and reasonable as the other laws instituted for the good of the commonwealth. Wherefore the party, who has acquired right by prescription or liberation from an obligation, may in point of conscience hold the property of such thing from the former owner or plead an immunity from the debt . . . for the former owner or creditor, after the prescription is accomplished, loses his right, which, by a just law, is transferred to the other. The most learned of the canonists are of opinion that the former owner cannot, in point of conscience, intermeddle with the thing which, after the prescription, is become another's. . . . But if, during the course of prescription the possessor or prescriber come to know who is the true owner, or that the debt is just from which he thereafter prescribes a liberation, in point of conscience, or *in foro interiori*, he ought not to plead it according to the just opinion of the canonists; for though by the civil law, the supervening *mala fides* of the possessor did not hinder the prescription to proceed, for preventing lawsuits, and for punishing of the negligence of the

proprietor that does not look after his effects timely, yet one cannot with a good conscience detain from another what is his; and before accomplishment of the prescription the law does not transfer the property to the possessor. . . . So where the ground of debt is not cut off by prescription, but only the mean of proof by witnesses is excluded, the debtor cannot honestly take the benefit if he knows the debt to be still owing, because the law does not discharge him from the debt, but only secures him against the danger of a groundless claim, by not admitting of a proof by testimony of witnesses, after a certain number of years; and therefore, though the creditor should not insist for his oath, yet he ought, as an honest man, to make payment; for otherwise he defrauds the creditor of his money" (*m*).

The pleading of the Statute of Limitations, said Holt, C. J. (*n*), is no disparagement to anybody. Garrow, B., also said, that he remembered it to have been remarked by Lord Kenyon, that the defence of the Statute of Limitations was by no means generally dishonourable, as some persons supposed: and added, it is right, that the subject should take advantage of the principle of a statute which, if it may in one or two cases, through the laches of the party, have barred a just demand, yet has the constant effect of shutting out unjust claims, founded on experiments made to take advantage of carelessness or misfortune, on the chance of vouchers being lost or mislaid. In the same case, Richards, C. B., said, that infinite injustice had been prevented by the statute (*o*). Lord Cranworth, C., also said (*p*), it may often be a righteous defence. The object of any statute of limitation, with respect to debts, is to make time a bar where there is a debt claimed, upon the ground that, after a certain time, a

(*m*) 2 M'Donnell, Inst. L. of Scotland, 183, 184.

(*n*) 7 Mod. Rep. 12.

(*o*) 6 Pri. 26, 31.

(*p*) 3 Jur., N. S. 454.

person does not retain the means of proving payment of the debt. It is not passed in order to enable the debtor, who really owes a debt, to escape payment, but to protect honest debtors. At the same time, I do not mean to say, that dishonest debtors have not a right to take the benefit of the statute. I refer to the purpose and intention of the legislature (*q*). Instead of being viewed in an unfavourable light as an unjust and discreditable defence, the Statute of Limitations should receive such support as will make it, what it was intended to be, emphatically, a statute of repose (*r*).

SECTION III.

The Mode of Operation of Prescription.

Laws of this kind, in their most general and comprehensive operation, may be regarded simply as bars or exceptions, of law or of fact, to the prosecution of any claim. Operation in general.

In the ancient Roman law, there was this principal difference between usucaption and prescription, that whoever acquired a thing by right of usucaption, at the same time acquired a right of claiming it wherever he found it; whereas prescription only enabled him to elude the demand of the former master, but afforded no means to recover possession when once lost (*s*); and imported strictly that plea, demur, or exception, by which the person in possession invalidates the claim of the first proprietor. Though these different names In the Roman law.

(*q*) Per Kindersley, V.-C., 4 Drew. 442.

(*s*) Grotius, B. ii. c. iv. s. 1, n. 1.

(*r*) 7 Curt. Amer. Rep. 618.

(*usucapio*, *præscriptio*) are frequently taken for the very same notion; and the latter now prevails in common use, and is the term by which we render the former (*t*).

Twofold aspect.

They may also be regarded in a twofold aspect, as a mode of acquiring and of transferring property. As between the actual possessor and the preceding one, and regarding the possession by the former only as the sole foundation of his claim, he may be considered as having *acquired* the property by virtue of his possession: and as between the same persons, and regarding the right or claim of the latter, the property may be considered as transferred by him. *Videtur ALIENARE qui patitur usucapi(u)* is the maxim of the Roman law.

Division of things in the Roman law.

In the Roman law things were divided into two classes, corporeal and incorporeal, and the former class was subdivided into things moveable and things immoveable; and to things corporeal or incorporeal, the enjoyment of them for such a time as was required by law gave to the possessor a title to them (*v*). This mode of acquiring a title, when applied to things corporeal and moveable only, was designated usucaption, *rem usucapere* (*w*), and when applied to things immoveable, as lands, or incorporeal, as securities, rights of action, &c., was designated prescription (*x*).

Prescription in that law.

Prescription in the Roman law, says Lord Mackenzie (*y*), gives an unchallengeable title to property by continuous possession for a certain time under the conditions determined by law. It is also a mode of extinguishing claims which are not prosecuted within the time fixed by law. By modern jurists, the term is used in a general sense, so as to apply either where lapse

(*t*) Puf. B. iv. c. xii. s. 1.

(*w*) D. 50, 16, 28.

(*v*) D. 41, 8, 8.

(*w*) Wood's Inst. 124.

(*x*) Ib.

(*y*) Studies in Roman Law,

of time extinguishes the right of the former owner and transfers it to the possessor, or where it merely bars the remedy of the former owner against the possessor.

Usucaption was also a branch of our ancient law, but seems to have had a more extended application than in the Roman law. Bracton says (z), "*rerum corporali-um dominia transferentur sine titulo, aut traditione, per usucaptionem, scilicet, per longam, continuam et pacificam possessionem, ex diuturno tempore.*" The things mentioned as the subjects of this law, as will be observed, are, however, things corporeal generally without any distinction, as in the Roman law, between those which were moveable and those which were immoveable. In later times, and down to our own day, no such mode of *acquiring* a title to lands, as is generally designated by the term Prescription, has been known by that appellation in the law of England. As a mode of acquisition of property our law, as we shall presently see, applies it to things in their nature incorporeal only.

Usucaption a branch of ancient English law.

The law of Scotland on this subject is founded on the Roman law, and, as respects personal property, corresponds with (a), but, as respects real property, formerly differed from, the law of England, and is designated, like its great prototype, by the term prescription, used however in a general sense, and is divided into positive and negative; positive, that the possessor shall not be disturbed after forty years; negative, that the neglect of the owner to exercise or prosecute his right during the whole period the law allows him for that purpose shall operate the loss or forfeiture of such right (b). But this division appears to rest upon only the operation of the law as applied to, in the former case, the possessor, in the latter case, the owner. In reality no substantial difference between the two kinds

Law of Scotland on this subject, and how viewed.

(z) B. 2, c. 22.

(b) Ersk. Inst. 556.

(a) *Don v. Lippmann*, 5 Cl. & F. 1.

exists. And even if the division be considered as founded upon the distinction that, in the former case, the law gives to the possessor a positive title against all persons, and, in the latter case, takes away the title of him who has allowed the appointed time for asserting it to expire, the difference between the two kinds of prescription is still rather apparent than real. The negative kind is considered to correspond with the English law as depending on the Statutes of Limitation (*b*). The law of Scotland, said Lord St. Leonards (*c*), "has been very much embarrassed by the introduction of these terms. They are not to be found in the act of parliament (*d*); they do not properly belong to the subject, nor do they properly describe it; for there are many cases in which you might very well, in point of language, say that there is a negative prescription even where a positive prescription also intervenes. The two must often be blended with each other. And I believe that there has been more contention about the meaning of those words than upon the substance of the cases in which those words have been matter of discussion. The act of parliament itself is the simplest act of parliament that ever was passed. It is a statute which he who runs can read;—there never was anything so plain and intelligible. It applies solely to heritable rights—that is, rights of real property; and it declares that where there has been possession upon a title for forty years the right shall be good against the world;—that is to say, no extrinsic circumstances shall ever be brought forward to affect it;—although perhaps originally it may have been defective; for it was not to support good titles, but to fortify infirm ones, that the statute interposed."

In the law of *England* two kinds of prescription.

In the law of England also prescription has been considered by some writers as of two kinds, positive or

(*b*) 2 M'Donnell, 184.

(*c*) 1 Macq. 320.

(*d*) Scotch Stat. 1617, c. 12.

affirmative, and negative. The former as a mode of acquiring rights in or to incorporeal hereditaments; the latter when applied to those laws which deprive persons of the exercise of their remedies for the recovery of any right to or in things corporeal or incorporeal (*e*). But the positive or affirmative kind is restricted to prescription properly so called, and applicable to the acquisition of things incorporeal only, by the enjoyment of them for the period of time by law fixed for the purpose (*f*). The negative kind, applied to things corporeal, as lands, is directed against the person out of the possession of them, not as transferring his estate to the actual possessor, but by precluding such person from asserting his right or claim thereto after the period assigned by the law for the purpose (*g*); but as to the right of the actual possessor, as between him and any other person than the person actually asserting right or claim thereto, is altogether silent.

This difference in the operation of these laws has been made, by an eminent Scotch writer, a ground of distinction between limitation and prescription. He designates the former as a denial of the remedy after the lapse of a certain time, without regard to the actual subsistence of the claim, and the latter as, and as inferring by operation of the law itself from the mere lapse of time, a presumption of abandonment or of satisfaction of, and thus extinguishing, the claim (*h*).

Difference of operation made to distinguish limitation and prescription.

The effect of the limitation of the time for asserting the right was said by Walsh, J. (*i*), in the case of Fines under 4 Hen. 7, c. 24, to be, to subject the right to a condition, that is, that the right be pursued within the time prescribed by law for the purpose. But in contracts, the time beyond which they cannot be enforced is not of the nature of the contract, nor are the

Effect of the time of limitation;

(*e*) 3 Cra. Dig. c. 2, s. 1.

(*f*) 2 Com. 264.

(*g*) 1 W. Bl. 675.

(*h*) Bell's Prin. Law of Scotland, ss. 596, 605.

(*i*) Plowd. 375 a.

parties to be assumed as contemplating the breach only of the agreement (*k*).

—as to the
right,

In all questions which turn on the limitation of time, the right is never taken into consideration: for the statute was made to bar right, and not give remedy in dubious cases. The rule, *ut sit finis litium*, operates against cases of right, rather than in cases of wrong (*l*). So it was said of the Statute of Fines, that the intention of the act was not so much to preserve former rights as to extinguish them (*m*).

—and the
remedy.

Statutes of Limitation affect, strictly speaking, the remedy and not questions upon the merits, and go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of these statutes is to fix certain periods within which suits shall be brought (*n*). Considered in their true light, these statutes are ordinarily simply regulations of suits and not of rights. They regulate the times in which rights may be asserted in courts of justice and do not purport to act upon those rights (*o*). In truth it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a law relating to procedure, having reference only to the *lex fori* (*p*). In some countries, however (*q*), the legislature has extended the operation of such statutes so as to extinguish the right of the person who has lost the possession to the property, and thus in effect transferring to the possessor that right.

In *England*.

In the law of England the Statute of Limitations in relation to rights of a personal nature is a rule of procedure only; and foreigners suing here are only allowed

(*k*) Ante, p. 18.

(*l*) Amb 647.

(*m*) Polwd. 369 a.

(*n*) Story, Conf. of Laws, s. 576.

(*o*) Ib. sect. 580.

(*p*) *The British Linen Co. v. Drummond*, 10 B. & C. 903; 1

Bing. N. C. 151; *Huber v. Steiner*, 21b. 202; 8 Moore, P. C. C. 35; *Don v. Lippmann*, 5 Cl. & F. 1; *Ex parte Kidd*, in *re Kidd*, 3 De G., F. & J. 646.

(*q*) Jamaica, *Beckford v. Wade*, 17 Ves. 87; and England and Ireland, 3 & 4 Will. 4, c. 27, s. 34.

the time limited by the statute of James, without reference to any limitation which may obtain in the country where the contract was made (*r*). And in relation to real property which they may lawfully hold in this country, they are of course concluded by the *lex loci rei sitæ*. As to real property, the statute does not produce its effect by the technical operation of disseisin, abatement or intrusion. The statute requires, as an indispensable preliminary, that the plaintiff in a possessory action should show that he has had possession of, or made an entry into, the estate within the limited period. The *onus probandi* lies upon him. The inquiry into the nature of the possession is only material with a view to this point, to ascertain whether it has been such, during this period, as to make good what the plaintiff is to prove in order to entitle him to his action, viz. whether it shows him to have had, during any part of the period, by himself, or by another, the actual possession; or whether the estate has, during the whole time, been in fact held and enjoyed by an adverse claim of title, that is, a claim not consistent with the title of the plaintiff (*s*).

The operation of the law in England and Ireland, in claims of the Crown against a subject, and in claims by one subject against another, differs; but in claims between subject and subject, with one exception, until 1835, was the same. In that year the operation of the law as to three classes of things was changed.

In England and Ireland, between the Crown and subject.

In claims of the Crown against a subject, the 21 Jac. 1, c. 2, excluded and negatived all remedies of the Crown against the subject, and the king's right and title were utterly barred (*t*) and transferred to the subject (*u*), or was exclusive of the right and title of the king, and affirmed and established the estate of the subject

(*r*) 13 Q. B. 818; *Pardo v.*

Bingham, 17 W. R. 419.

(*s*) 2 Jac. & W. 164.

(*t*) 3 Inst. 188, 189.

(*u*) 1 Jones & L. 62.

as against the Crown, and all persons claiming or pretending to claim under it any hereditaments, except, as to the Crown, liberties and franchises. This act was intended to be extended by the 9 Geo. 3, c. 16, in England, and by the 48 Geo. 3, c. 47, to Ireland; and the 9 Geo. 3, c. 16, in similar terms, has been extended to the Duke of Cornwall, in relation to some of his property and possessions in the county of Cornwall, by the 7 & 8 Vict. c. 105; and in relation to other property and possessions of his not within the last-mentioned statute, and to other property and possessions not within that county, the provisions of the 9 Geo. 3, c. 16, are extended to him by the 23 & 24 Vict. c. 53, subject nevertheless, as to the property and possessions included in the last-mentioned act, to the provisions contained in the ss. 72 and 75 of the 7 & 8 Vict. c. 105, with respect to the property and possessions included therein, and are also amended and extended to all actions and suits by him, and also to the acts of the 7 & 8 Vict. c. 105, and the 23 & 24 Vict. c. 53, by the 24 & 25 Vict. c. 62.

Between subject and subject.

In claims to land between subject and subject, by the Statute of Limitations the *right* was not, until 1834, the direct object of this law. The land was considered neither as acquired by one party, nor transferred from the other. The law merely extinguished the remedy of the one party without giving the estate to the other (*x*). The title remained, but the remedy was lost (*y*), or rather suspended. Practically, however, in one respect at least, the result was the same as if the right had been the object, for a right without a remedy is a mere negation. There was this important difference, however—the right being merely suspended was therefore capable of revival at any time after the period

(*x*) *Davenport v. Tyrell*, 1 W. Bl. 675.

(*y*) 2 Jac. & W. 140.

within which the remedy was to be pursued had elapsed.

A fine with proclamations and non-claim for five years after it was levied, is, or rather until the year 1834 was, the exception referred to. The fine not only passed the interest of the conusor or person levying it, and extinguished and perpetually barred him of all present and future right and possibility of right, or other collateral benefit to the thing whereof the fine was levied, but was a perpetual bar to all other persons having any right in or to the thing, and not asserting their right within five years after the last proclamation of the fine (*z*); although as to such other persons, if neither the conusor nor the conusee had an estate of freehold in the thing, the fine was void, whatever might be its effect between the parties to it (*a*).

Sir William Grant, speaking of the possessory law of the island of Jamaica of the 4 Geo. 2, said: "This possessory law is framed upon a different principle from our Statutes of Limitation. It is rather of the nature of the *usucapio* of the Roman law, or the positive prescription of the law of Scotland. It does not bar the legal remedies, if the parties do not proceed within a certain time; but it converts a possession for seven years, under a deed, will or other conveyance, into a positive absolute title against all the world . . . and it is provided that after such possession, the party 'shall be at liberty to give this act in evidence, or plead the same in bar,' not, as our statute says, 'of certain legal remedies,' but in bar in any suit or suits, claim or demand to be brought or made against him, her, or them," &c. &c. (*b*).

To a certain extent, however, this law, as will be hereafter shown, has been placed on a different founda-

Right, in case of land, &c., now extinguished.

(*z*) Shep. T. 6; *Stonell v. Lord* (b) *Beckford v. Wade*, 17 Ves. 83.
Louch, Plowd. 363 n.

(*a*) Shep. T. 14.

tion, and now, in the case of lands, rents and advowsons extinguishes, after the lapse of the prescribed periods, the right and title of the person claiming (*c*). Time, with preserving hand, has meted out the portions of duration which have given birth to the new parliamentary title, and with his destroying scythe has cut down the material witnesses who could testify . . . of their own knowledge of facts which are at variance with the claim (*d*). The consequences of this alteration, as will hereafter appear, are important. In relation to other matters of the nature of things personal, the claimant is deprived of his remedy after a certain period; but the right is left unaffected; that is, is not expressly the direct subject of any legislative provision similar to the case of land (*e*).

In cases of prescriptive claims made absolute.

In relation, however, to rights of a prescriptive nature of two classes, such as (1) claims to any right of common or other profit or benefit to be taken and enjoyed from or upon any land, and to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, from or over any land or water (*f*), and (2) prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition, real or otherwise (*g*), neither the right itself nor the remedy for it is the subject of any legislative provision in any mode analogous to that in the case of land itself, and of things personal; but such rights of the first class, after having been actually taken and enjoyed by any person claiming them without interruption for a specified period, are preserved from being defeated or destroyed, as they were formerly (*h*), by showing only that they were first taken or enjoyed at any time prior to such period, but

(*c*) 3 & 4 Will. 4, c. 27.

(*d*) 9 Ir. Eq. Rep. 471.

(*e*) 21 Jac. 1, c. 16; 9 Geo. 4, c. 14; 3 & 4 Will. 4, cc. 27, 42.

(*f*) 2 & 3 Will. 4, c. 71.

(*g*) 2 & 3 Will. 4, c. 100.

(*h*) Litt. s. 170; Co. Litt. 113 b.

are still left liable to be defeated in any other way by which they are liable to be defeated; but after a further specified period, when they are not taken and enjoyed by some consent or agreement expressly made or given for the purpose by deed or writing, are rendered absolute and indefeasible; and such rights of the second class, in cases where the render of tithes in kind is demanded, are to be sustained and deemed good and valid in law, upon evidence showing, in claims of a *modus decimandi*, the payment or render of such *modus*, and, in claims to exemption or discharge, showing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for a certain period before the time of the demand; unless in claims of a *modus*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality or quantity from the *modus* claimed, or in claims to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, be shown to have taken place at some time prior to such period, or evidence be given that the payment, render or enjoyment was had by some consent or agreement expressly made or given for the purpose by deed or writing; and if such evidence be extended to a further period next before the time of such demand the claim is to be deemed absolute and indefeasible, unless the payment, render or enjoyment was had by some such consent or agreement.

CHAPTER II.

THE RISE AND PROGRESS OF PRESCRIPTION IN
ENGLAND AND IRELAND.

SECTION I.

The Rise and Progress down to the present Reign inclusively, as affecting the Crown and the Duke of Cornwall.

Anciently, no time of limitation against the Crown.

THE rise and progress of these laws in general, affecting the Crown, can be very distinctly traced. In the early period of our jurisprudence, in respect of that ancient prerogative of the Crown, that *nullum tempus occurrit regi* (*a*), titles of the king were not restrained to any limitation of time; for that no limitation of time, that ever was made, did ever limit the title of the king to any manors, lands, tenements, or hereditaments to any certain time (*b*). It was also applicable to rights claimed by prescription against the king (*c*), but was, both at common law and by statute, subject to various exceptions (*d*).

Prerogative maxim, *nullum tempus*, until Jac. 1.

The prerogative of the Crown is precisely the same as regards what is called the property of the Sovereign and the property of the public (*e*); and is founded upon this, that the prerogative is the inheritance of the Crown as Sovereign of this realm, and is too great a matter to be

(*a*) Litt. s. 178; Co. Litt. 41 b, 57 b, 90 b, 118 a, 294 b, 344 a; 11 Co. 75; Plowd. 243.

(*b*) 3 Inst. 188.

(*c*) 2 Boll. 364, l. 40; Bro. Stat.

Lim. 39.

(*d*) See Bro. Stat. Lim. 180; Co. Litt. 119 a, n. 1, 180 b, n. 2.

(*e*) Per Lord Brougham, 9 Cl. & F. 211.

governed by the narrow rules of private property (*f*), and that the Crown was supposed to be so much engaged in public affairs, and to be devoted so much to the public interests (*g*), that it has not the opportunity of actively superintending its own particular interest, and perhaps, also, that the weakness, supineness and negligence of the immediate possessor of the crown should not impair the rights and interests of the successor. This prerogative, until the reign of James the First, continued in full force. Before the statutes in his reign in relation to the property of the Crown, we know that from the different disputes about the succession of the Crown, and grants to partisans, the Crown lands had passed into a great variety of hands. Many persons had been long in possession of their estates; money had been expended upon them, and they had passed from hand to hand. Under these circumstances, the reclaiming them was felt to be extremely oppressive, and therefore a bill at that time, to quiet possession under certain circumstances, was thought necessary (*h*). Hence the two statutes now to be noticed.

That the law limiting the time within which, in cases between subject and subject, claims should be asserted, should not apply in cases between the Crown and its subjects, was, in principle, false; although, in the latter cases, the law might be applied with less force, and a more lengthened period be allowed to the Crown for the assertion of its rights, than in the former cases. In that reign accordingly the legislature, to a certain extent, abrogated, or rather perhaps modified, this ancient maxim or prerogative, by enacting that the Crown should not sue any person for or concerning any manors, lands, tenements, rents, tithes, or hereditaments, other than liberties and franchises,

This maxim
abrogated or
modified in his
reign.

(*f*) Fortesc. Rep. 411.
(*g*) Co. Litt. 90 b.

(*h*) Wightw. 236.

or the profits thereof, or make any demand of the same, by reason of any right or title accrued sixty years *past* and more, and then *in esse*, unless answered, by virtue of such right or title, the profits of the same manors, &c., or the profits had been duly in charge, or had stood *insuper* of record, within sixty years *next before* the beginning of the then session of parliament; and every person claiming the same manors, &c., with such exception, or such profits, were to enjoy against the Crown, claiming by any title accrued within that period, and then *in esse*, the manors, &c., which with such exception they had so enjoyed, or the profits whereof they had taken for that term, unless the Crown had been so answered the rents, or the profits had been duly in charge or stood *insuper* of record within the same space of time, and also against all patentees or grantees from the Crown, the same manors, &c., but without any such exception (*i*).

Again, by chapter 14 of the same session, wherever the Crown has been, or shall be, out of possession for twenty years, or shall not have taken the profits of lands, &c. within twenty years before any information of intrusion brought to recover the same, the defendant may plead the general issue and shall not be required to plead specially, and shall retain the possession he had at the time of the information exhibited until the title be tried, found or adjudged for the Crown.

As before the former of these two acts, the king was considered as in actual possession, and the defendant was bound to plead his title, as a justification for his trespass and intrusion; so, since the act, he might stand upon his actual possession of sixty years, and put the king to prove his title within that period. Hence, therefore, the latter act, regulating the course of proceeding, by remitting the ancient prerogative of putting

(i) 21 Jac. 1, c. 2; 3 Inst. 190.

the adverse party to plead his title specially in cases where there was a reasonable presumption that the party might stand upon his possession alone. It certainly would have been incongruous to preserve the old prerogative, that the king was in possession, whilst the act gives a title by adverse possession, and so by putting the party to plead specially his title, which might prove defective, to subject him to the risk of defeating the very plea or defence which the statute gave him (*k*).

Lapse of time would greatly diminish the beneficial operation of the statute of 21 Jac. 1, c. 2. For the Crown was deprived of its remedy for, and the subject was confirmed in the enjoyment of, the property, in those cases only where the right of the Crown had accrued within sixty years *before* the session of parliament in which the statute was passed (*l*); so that when the possession of the land belonging to the Crown was acquired after the passing of the act, it would not affect the right of the Crown to such land. This continued until the reign of George the Third. In his reign the statute of James was amended and rendered more effectual (*m*), but is now repealed (*n*).

Alteration of
the act of
Jac. 1,

The preamble to the statute of George the Third states, —in the reign of Geo. 3. that by the statute of James, c. 2, the right of the Crown to all manors, &c. was limited to sixty years next before the beginning of the session of parliament wherein the latter statute was passed, and that his Majesty's subjects were secured in the quiet enjoyment of all manors, &c. enjoyed by them, or whereof they had taken the rents, for that period; and that the said act was then, "by efflux of time, become ineffectual to answer the good end and purpose of securing the general quiet of the subject against all pretences of concealment whatsoever." The

(*k*) Wightw. 236. See also *Doe*
d. *Watt v. Morris*, 2 Bing. N. C.
189, 197.

(*l*) Ib. 147, 158.

(*m*) 9 Geo. 3, c. 16.

(*n*) 26 & 27 Vict. c. 125.

principal enactment of the statute 9 Geo. 3 is; that the Crown shall not sue any person for or concerning any manors, lands, tenements, rents, tithes, or hereditaments, other than liberties or franchises or the profits thereof, or make any demand of the same, by reason of any right or title which has not first accrued, or shall thereafter accrue, within sixty years next before the suit, unless answered, by virtue of such right or title, the profits thereof, or the profits of any honour, manor, or other hereditament whereof the premises in question are parcel, or the profits have been duly in charge to the Crown, or stood *insuper* of record within that time; and that any person, according to his estate and interest therein, is to enjoy the same manors, &c., with such exception, against the Crown claiming by any title which does not first accrue within that period, unless the Crown has been so answered, or the rents have been so in charge, or stood *insuper* of record within that time, and also against but, as in the statute of James, without any such exception, against all patentees or grantees from the Crown (o). This statute, however, applies to England only.

Act as to corporate offices and franchisees.

In the same reign was passed the act enabling persons, exercising corporate offices or franchises for six years after being actually admitted and sworn into them, to plead such exercise to an information on behalf of the Crown, in the nature of a *quo warranto* (p).

Extension of act of 9 Geo. 3.

In the present reign, the principle of the 9 Geo. 3 was still further extended. By the 24 & 25 Vict. c. 62, the Crown is not to recover the manors, lands, tenements, rents, tithes, or hereditaments, with such exception as expressed, by reason only that they, or the rents, revenues, issues or profits thereof, have or shall have been in charge, or stood *insuper* of record within the sixty years, but that their having been in charge or so

(o) Sect. 1.

(p) 32 Geo. 3, c. 58. Vide *supra*, p. 19.

standing shall be, as respects the person claiming against the Crown, of no effect (*q*). And for the purposes of the 9 Geo. 3, the Crown is not to be deemed to have been answered the rents, &c. of any lands, &c. which have been enjoyed, or of which the rents, &c. have been taken by any other person for sixty years next before the commencement of any proceeding for recovering the same, or in respect thereof, as in the said act mentioned, by reason only of the said lands, &c. having been parcel of any honour or manor or other hereditaments of which the rents, &c. have been answered to the Crown, or some other person under whom it claims, or of any honour, manor or other hereditaments which have been duly in charge to the Crown, or stood *insuper* of record (*r*). And in the construction of the 9 Geo. 3, and of the act under notice, the right of the Crown to any manors, &c. subject to any lease for years, or for any life or lives, is not to be deemed to have first accrued until the determination of such lease, as against any person whose possession or enjoyment of such manors, &c., or whose receipt of the rents, &c. thereof, has commenced during such lease, or who claims under any person whose possession or enjoyment of such manors, &c., or whose receipt of the rents, &c., have so commenced (*s*).

No legislative provision similar to that of 9 Geo. 3, Act for c. 16, in relation to the possessions of the Crown in Ireland. Ireland, was passed until nearly forty years after that statute, and the Irish Statute of Limitations did not bind the Crown (*t*). In the forty-eighth year of that reign, such provision was made similar to that for England (*u*). The provisions in the statute for Ireland, and the terms of those provisions, differ from those in the English statute (*x*). The terms in the statute of

(*q*) Sect. 1.

(*r*) Sect. 3.

(*s*) Sect. 4.

(*t*) *Reg. v. Bayly*, 1 Dru. &

War. 213.

(*u*) 48 Geo. 3, c. 47.

(*x*) See *Tutkhill v. Rogers*, 1

Jones & La Touche, 36.

James, and in 9 Geo. 3, in relation to patentees and grantees of the Crown, are omitted in the statute for Ireland.

Prescriptive
rights in
England,

Again, in the reign of William the Fourth, the legislature extended the principle to the following prescriptive rights in *England*: (1) rights of common and other profits or benefits to be taken and enjoyed from or upon any land of the king, his heirs or successors, except tithes, rent, and services; (2) rights of way and other easements, watercourses and the use of any water to be enjoyed or derived upon, over or from any land or water of the king, his heirs or successors, or being parcel of such duchies respectively (*y*); and also (3) all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition, real or otherwise, in cases whether the render of tithes in kind being demanded by the king, his heirs or successors (*z*). And in the present reign, the 2 & 3 Will. 4, c. 71, has been extended and applied to *Ireland* (21 & 22 Vict. c. 42).

—and *Ireland*,

—except access
and use of
light.

The statute 2 & 3 Will. 4, c. 71, extends to cases of the access and use of light to and for any building (*a*). But in this section, the Crown is not, as in the former sections it is, expressly named, and therefore is not bound in such cases. This will be considered hereafter.

Advowsons.

The statutes affecting the Crown do not, in express terms, extend to advowsons. If not by construction, there is no time of limitation for claims to them by the Crown. This question will be also considered hereafter.

The prescriptive rights embraced by the 2 & 3 Will. 4, c. 71, when claimed to be taken or enjoyed from or upon any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, were also made subject to that law. The prescriptive rights embraced by the

(*y*) 2 & 3 Will. 4, c. 71.
(*z*) 2 & 3 Will. 4, c. 100.

(*a*) Sect. 3.

2 & 3 Will. 4, c. 100, when demanded by any Duke of Cornwall, were also made subject to that law, but not when demanded in respect of the Duchy of Lancaster.

In the present reign the limitation fixed by the statute 9 Geo. 3 was extended to the Duke of Cornwall(c), and that statute was also amended and extended(d). The terms of 7 & 8 Vict. c. 105, are nearly the same as those of the 9 Geo. 3, and comprehend lands, manors, tenements, rents, tithes and hereditaments in the county of Cornwall only. But not only liberties and franchises, but mines, minerals, stone and substrata are excepted(e); and the act does not extend to any royalty, liberty, office or franchise which had at any time theretofore been let in convention or granted by assession, or any estate, right, title or interest therein(f); nor to any property, right, claim, or question of, to or concerning navigable rivers, estuaries, ports or branches of the sea, or the funders or soil thereof respectively, or the shores between high and low water mark respectively(g), nor to any hereditaments not within the county of Cornwall; and contains no terms corresponding to those in 21 Jac. 1, c. 2, and 9 Geo. 3, as to patentees or grantees, and is not to affect the 2 & 3 Will. 4, c. 100(h).

Act of Geo. 3 extended to Duke of Cornwall, and amended.

The Cornwall Submarine Mines Act, 1858, enacts and declares that all mines and minerals lying under the seashore between high and low water marks within the said county, and under estuaries and tidal rivers and other places (below high water mark), even below low water mark, being in and part of the county of Cornwall, are, as between her Majesty in right of her Crown on the one hand and the Prince and Duke in right of

(c) 7 & 8 Vict. c. 105; 23 & 24
 Vict. c. 53; 24 & 25 Vict. c. 62.
 (d) 24 & 25 Vict. c. 62.
 (e) Sect. 71.

(f) Sect. 85.
 (g) Sect. 86.
 (h) Sect. 87.

his Duchy of Cornwall on the other hand, vested in the Prince and Duke in such right as part of the soil and territorial possessions of the said duchy; but is not to extend to the mines and minerals in or under land below high water mark, parcel of any manor belonging to her Majesty in right of her Crown (*l*). Then, that all mines and minerals lying below low water mark under the open sea, adjacent to but not being part of such county, are, as between her Majesty in right of her Crown on the one hand and the Prince and Duke on the other hand, vested in her Majesty in right of her Crown, as part of the soil and territorial possessions of the Crown (*m*). And also enacts, that the expression "mines and minerals" shall comprehend all mines and minerals, and all quarries, veins or beds of stone, and all substrata of any other nature whatsoever, and the ground and soil in, upon and under which they lie (*n*).

By the 23 & 24 Vict. c. 53, all the provisions of the 9 Geo. 3, applicable to the Crown, are extended and made applicable to the Duke of Cornwall, as if re-enacted, and he named throughout where the Crown is named; subject, however, as to the property and possessions included in it, to the sects. 72 and 75 of the 7 & 8 Vict. c. 105, with respect to the property and possessions included therein, but is not extended to the property or possessions in relation to which provision for the limitation of actions and suits, and for quieting titles, is made by the 7 & 8 Vict. c. 105, nor affect either the 2 & 3 Will. 4, c. 71, or the 2 & 3 Will. 4, c. 100 (*o*).

In the present reign, also, the 9 Geo. 3, as amended by 24 & 25 Vict. c. 62 (*p*), was also by the latter sta-

(*l*) 21 & 22 Vict. c. 109, s. 1.

(*m*) Sect. 2.

(*n*) Sect. 8.

(*o*) Sect. 2.

(*p*) Supra, p. 32.

tutes extended to the Duke of Cornwall, and to the acts 7 & 8 Vict. c. 105, and 23 & 24 Vict. c. 53; and the amending statute is to be construed with and deemed part of the two latter statutes (*q*).

SECTION II.

The Rise and Progress of Prescription down to the Reign of William the Fourth, as affecting the Clergy.

The principle or maxim applied in the case of ecclesiastical persons generally, in relation to their possessions in right of the Church, was, as in the case of the Crown, *nullum tempus occurrit ecclesiæ*. The reason for this application was, as in the case of the Crown, that the interests of the Church, as a corporation, should not suffer from the supineness, the negligence, or the connivance, of the individual member immediately in the possession of the property. "It is difficult," said Eyre, B. (*r*), "to settle the bounds of this maxim. It is clear that the church shall in no case be barred by such imputed laches as would bar private persons; that the Statutes of Limitation shall not extend to it. Whether the maxim should go further I much doubt. With respect to presumption arising from the acts of other persons I think it ought to have the same force against the church as against private persons. . . . But nothing is to be presumed from the laches of the church in their not claiming."

Maxim *nullum tempus* applied to the clergy.

Until the reign of Henry the Seventh, neither the alienation by ecclesiastical persons of the lands belonging to them in their corporate capacity (*s*), nor the posses-

No alienation or possession affected the successors.

(*q*) 24 & 25 Vict. c. 62, s. 2.

(*r*) 3 Gwill. 1176; 2 E. & Y.

(*s*) Litt. s. 648; Fitzh. N. B. 50 c.

344; 1 Eagle on Tithes, 99.

sion of those lands acquired against, or from, them without alienation, was binding upon their successors, but only upon themselves and such of their successors as submitted to such alienation or possession; for none of the Statutes of Limitation, appointing certain times within which certain entries were to be made and actions were to be brought for the recovery of lands belonging to such persons in that capacity, were binding upon them so as to exclude their successors (*s*). In general, parsons and vicars have an estate for life only in the possession of their benefices, and the fee is in abeyance (*t*). And therefore such persons could not maintain a writ of right. The highest writ they could have was a *juris utrum* (*u*), a possessory writ only, and is a great proof that the right of the fee is not in them nor in any others (*x*), but in abeyance. For the benefit of the Church and their successors, they are, in some cases, esteemed in law to have a fee simple qualified; but to do anything to the prejudice of their successors, in many cases the law adjudgeth them to have in effect but an estate for life (*y*). Thus if a parson or vicar aliened parcel of his glebe to another in fee and died or resigned, his successor might well enter notwithstanding such alienation (*z*). So if a parson received rent of the tenant of the land, aliened by his predecessor, he could not during his life have a *juris utrum*, but his successors could have such writ (*a*).

Statute of
Fines as af-
fecting the
clergy.

In the reign of that monarch was passed the Statute of Fines (*b*). By that statute, a fine with proclamations, after five years from the last of them, gave, in general, with exceptions in cases of certain personal disabilities, absolute right and title to the property comprised in it.

(*s*) *Croft v. Howel*, Plowd. 538 and n. 10; *Stowel v. Lord Zouch*, ib. 375; *Barker v. Richardson*, 4 B. & Ald. 579; *Runcoorn v. Doe* d. *Cooper*, 5 Barn. & C. 700.
(*t*) Litt. s. 646.

(*u*) Plowd. 538:

(*x*) Litt. 646.

(*y*) Co. Litt. 341 a.

(*z*) Litt. s. 643.

(*a*) Fitzh. N. B. 50 c.

(*b*) 4 Hen. 7, c. 24.

After this statute and down to the reign of Elizabeth, the clergy, with some distinctions however founded on the nature of their capacity as corporations aggregate or sole, were bound by a fine and a non-claim for five years. Thus, corporations which of themselves had absolute estate and authority, as dean and chapter, colleges, and such like, were bound by fine and non-claim thereon for five years (*c*). But corporations which of themselves had no absolute estate or authority in their possessions, as a bishop, dean, parson, vicar or prebendary, or such like, were only bound by a fine and non-claim during his own time, and so of each successor during his own time (*d*).

In the following reign was passed another statute which affected some of the clergy. This was the 32 Hen. 8, c. 2, and enacted that no person should sue a writ of right or make any prescription, title, or claim, of or to any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies or other hereditaments otherwise than upon the seisin or possession of his ancestor (*e*) or predecessor (*f*), which had been or then was or should be seised within sixty years next before the teste of the writ or before the prescription (*g*). The statute also enacted that no person should have any action possessory, otherwise than on such seisin or possession, for any manors, lands, tenements or other hereditaments within fifty years next before the teste of the original writ (*h*), and on his own seisin or possession for any manors, lands, tenements or other hereditaments above thirty years next before such teste (*i*), or make any avowry or cognizance for any rent, suit or service, and allege therein any seisin thereof in the possession of his ancestor or predecessor, or in his own possession,

Some of them
affected by
32 Hen. 8, c. 2.

(*c*) Plowd. 538; Shep. T. 22.

(*d*) *Ib.*

(*e*) See Co. Litt. 78 b; 1 Jac. & W. 557.

(*f*) See Brooke's Reading, 33;

Co. Litt. 78 b.

(*g*) Sect. 1.

(*h*) Sect. 2.

(*i*) Sect. 3; *Bevil's case*, 4 Co. 10.

or in the possession of any other whose estate he should pretend or claim to have, above fifty years before the making of the avowry or cognizance (*k*), and that all formedons in reverter and in remainder, and *scire facias* upon fines, should be sued within fifty years next after the title and cause of action accrued and not after (*l*). And that if in any such cases the seisin within the periods prescribed could not be proved, and should be traversed (*m*), all such persons and their heirs were to be barred for ever of all the said writs, actions, avowries, cognizance, prescription, title or claim (*n*). A bishop or a parson making, after this statute, a title upon the seisin of a predecessor, was expressly within the statute (*o*). So, where a *juris utrum* passed against a parson upon the trial of a seisin, his successor was barred by the trial, because within the equity of the statute (*p*). A dean and chapter were not within the statute, because they make title on their own seisin, and not on the seisin of their predecessors (*q*).

Acts restrain-
ing alienation
by the clergy.

In the reign of Elizabeth and of James the First the clergy generally were restrained from alienating their possessions otherwise than by way of lease (*r*) or by way of exchange (*s*), and from *charging* them in any way (*t*). And the acceptance, by a successor, of rent reserved by a lease which is void, is no affirmance of such a lease, but merely creates a tenancy from year to year (*u*). Although, however, the statutes of the 1 and 13 Eliz. make absolutely void all alienations other than leases in the mode expressed, yet as these statutes were made for the benefit and protection of the successor only, alienations not warranted by them are not void but good

(*k*) Sect. 4.

(*l*) Sect. 5.

(*m*) See 1 Jac. & W. 557.

(*n*) Sect. 6.

(*o*) Bro. Read. Stat. Lim. 33.

(*p*) Ib. 107.

(*q*) Ib. 33, 60.

(*r*) 1 Eliz. c. 19; 13 Eliz. c. 10.

(*s*) 14 Eliz. c. 11; Co. Litt. 45 a, 325 b, 342 a.

(*t*) 13 Eliz. c. 20; *Doe v. Somerville*, 6 B. & C. 126; *Doe d. Broughton v. Gully*, 9 Ib. 344; *Shaw v. Pritchard*, 10 Ib. 241.

(*u*) *Doe d. Bramall and another v. Collinge*, 7 C. B. 939.

against the alienor, if a sole corporation, or if the head of a corporation aggregate of many, so long as he remain such head (x).

These restrictive statutes have, in effect, as respects the operation of a fine and non-claim as against ecclesiastical corporations aggregate, placed them in the same position as ecclesiastical corporations sole. An absolute title could not be acquired against the corporation to the fee simple, but only against the head of it during his own time, and so with respect to his successors from time to time during each of their times (y). This state of the law continued until the abolition of fines in the reign of William the Fourth (z). On that abolition the acquisition of a title against an ecclesiastical corporation, as well aggregate as sole, under 4 Hen. 7, was virtually abrogated, and the ancient maxim applicable to the church just noticed, but for the new periods of limitation applied to the clergy, presently to be noticed, would have recovered much of its vitality. The legislature has since almost entirely abrogated this maxim. Nearly contemporaneous with the abolition of fines a time was appointed within which all ecclesiastical persons are to recover lands, rents, advowsons, &c. (a).

Effect of
these acts.

This application of the law, however, is to the corporeal possessions of the clergy. Little or nothing appears in the books in relation to acquiring rights of a prescriptive nature by the laity against ecclesiastical persons, so as to bind, not only the individual against whom such rights have been enjoyed, but also his successors in perpetuity. Formerly the laity could not prescribe in *non decimando*. And this was *in favorem*

(x) *Hunt v. Singleton*, 8 Co. 60; *Salv v. Bp. Cov. and Lich.* ib. 59; Co. Litt. 45 a. As to *Hunt v. Singleton* see 6 East, 98, 103.

(y) Co. Litt. 44 a, 45 a; *Magdalen Coll. case*, 11 Rep. 66; 1 Roll.

Rep. 171, S. C. See also *Barker v. Richardson*, 4 B. & Al. 579; *Runcorn v. Doe d. Cooper*, 5 Barn. & C. 696.

(z) 3 & 4 Will. 4, c. 74.

(a) 3 & 4 Will. 4, c. 27; 6 & 7 Vict. c. 54; infra, Sect. IV.

ecclesiarum, lest, as was said, laymen should spoil the church, but they might prescribe in *modo decimandi* (*d*), and the rule was the same as well in the case of a lay rector as in that of a spiritual one (*e*). So the mere naked non-render of tithes would not support the defence of a conveyance or release of them (*f*). But the actual pernaney and receipt of tithes separate from and independent of any interest in connection with the lands themselves, supported by conveyances of the tithes, as well as of the lands, and perhaps even a disclaimer of the tithes by the rector, whether lay or spiritual (*g*), although by parol merely (*h*), is, against as well a spiritual rector (*i*) as a lay rector (*k*), and against grantees of the crown (*l*), such evidence of title as will warrant the presumption of a legal grant of the tithes to the owner of the lands.

The principle applicable to the corporeal possessions of the clergy seems, however, to be equally applicable to prescriptive rights claimed as well in, upon, or over those possessions of the clergy, as against them personally, as well prior as subsequent to the 32 Hen. 8, c. 2, but, after the disabling statutes and until the reign of William the Fourth, in only a limited degree, as in the case of their corporeal possessions (*m*); and in the latter reign the principle was expressly applied to such rights, and when they are claimed and established for certain specified periods are made valid and eventually absolute (*n*).

(*d*) Hob. 297; 1 Mad. 243, 245; 3 Bli. 297.

(*e*) *Fanshaw v. Rotheram*, 1 Eden, 276; 3 Anstr. 705; 1 Mad. 243; *Andrews v. Drover*, 2 Bing. N. C. 1; 3 Bli. 251.

(*f*) 2 You. & Jer. 368.

(*g*) See *Norbury v. Meade*, 2 Bli. 211, 249, 256.

(*h*) *Ib.*

(*i*) *Scott v. Airey*, 3 Gwill. 1174; *Strutt v. Baker*, 2 Ves., Jun.

625; *Williams v. Bacon*, 1 Sim. & S. 415; *S. C.* on app. 3 Russ. 525; 3 Bli. 251.

(*k*) See *Norbury v. Meade*, supra; *Ross v. Aglionby*, 4 Russ. 494.

(*l*) *Monck v. Huskisson*, 1 Sim. 280.

(*m*) See *Barker v. Richardson*, 4 B. & Ald. 579.

(*n*) 2 & 3 Will. 4, cc. 71, 100; infra, Sect. IV.

SECTION III.

The Rise and Progress of Prescription down to the Reign of William the Fourth, as affecting the Laity.

These laws, in general, affecting the laity, or all those persons, corporations as well as individuals, who are not subject to or affected by these laws in the same way as, or in a different degree to, the Crown, and the persons and corporations mentioned in the two preceding sections, are the subject of consideration in the present section. The time when these laws affecting the laity was established cannot be precisely determined, but their recognition and subsequent progress can be distinctly traced.

Time when established not determinable.

From the earliest period these laws, as a part of our system of jurisprudence, appear to have been recognized and acted upon. Bracton, one of the justices in eyre in the reign of Henry the Third (*o*), mentions them. The title of chapter 22 of book 2 of Bracton's work (*p*) is, *Qualiter acquiritur possessio per usucaptionem*; and *usucaptionem* he explains to be *sine titulo et traditione per longam, continuam et pacificam possessionem ex diuturno tempore*; and in another place, *per longam et pacificam seisinam, habitam per patientiam et negligentiam veri domini*. "*Ita erit,*" he says, "*modus acquirendæ possessionis: longa enim possessio, sicut jus, parit jus possidendi, et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem, quia omnes actiones in mundo infra certa tempora habet limitationem;*" and, in general, actions, personal and mixed, were to be brought within a certain period on account of the defect of proof which would happen by lapse of time (*q*). The length of time, however, for which peaceable possession to give a title to land was

Early recognition of these laws.

(*o*) Crabb's Hist. Eng. Law, 157.

(*p*) 10, 51 b.

(*q*) Bract. 102 b.

considered by the common law necessary, was not defined but was left to the discretion of the judges (*r*). Plowden also states (*s*) several instances of the care taken by the ancient law to limit a time for the public repose of the realm, and in order to put a stop to contention and avoid universal trouble to the subjects of the realm (*t*). The authority of Bracton, however, as well as of Glanvil, in our law, has not always been acknowledged (*u*), and is not now (*x*).

Prescription of two kinds—by statute and at common law.

Prescription is of two kinds—(1) that which is limited from a certain time by act of parliament, as from the time of Henry the First, which was the first time of limitation set down by any act of parliament, and so from the reign of Richard the First (*y*); and (2) the prescription, time out of memory of man, was (*z*) at the common law, and limited to no time, is from the reign of King Richard the First, and the time from that reign was intended from the first day of his reign; for, *from the time*, being indefinitely, doth include the whole time of his reign (*a*), which commenced in the year 1189; but whether on the day of the death of the preceding sovereign, or on the day of his own coronation, has been the subject of controversy (*b*); but, in law, both kinds were all one (*c*).

At common law, prior to Statute of Merton, two classes of action for recovery of land.

At common law, prior to the Statute of Merton (*d*), actions for the recovery of land were of two classes, possessory, or those wherein the possession of, as distinguished from the *dominium* or property in, the land

(*r*) Bract. 51 b.

(*s*) Rep. 357.

(*t*) 2 Jac. & W. 141.

(*u*) See Fitz. tit. Garde, 71; *Stowel v. Lord Zouch*, Plowd. 853 a; but see 5 Reeves' Hist. Eng. Law, 570, 571; Hale's Hist. Com. Law, c. 8.

(*x*) See *Blundell v. Catterall*, 5 B. & Ald. 382, and authorities there cited. The writer has also been informed by a professional

friend that in his hearing the late Lord Wensleydale said, in the Court of Exchequer, that Bracton is not an authority in our law.

(*y*) Co. Litt. 115 b.

(*z*) Litt. s. 170.

(*a*) Co. Litt. 115 a.

(*b*) See Sir H. Nicolas's *Chronology of History*, 284 *et seq.*

(*c*) Litt. s. 170.

(*d*) 20 Hen. 3, c. 8.

was primarily in question, and *droitural*, involving that *dominium* or property (*e*); and the commencement of those actions, of both classes, was by writs corresponding in form to the nature of each class of action. And such writs were to be sued out within certain periods of time fixed by that law (*f*).

In writs of right, at the common law for some years prior to the Statute of Merton, a descent might be conveyed from the time of Henry the First. That statute, however, *ordained* that there should be no mention of a time so distant, but only from the time of Henry the Second, and that certain specified writs should not pass the last return of King John from Ireland into England, which was in the twelfth year of his reign (*g*), and that certain other specified writs should not pass the first voyage into Gascony of the then king, Henry the Third (*h*).

Computation of time of limitation in writs of right before that statute.

By the Statute of Westminster 1 (*i*), a new time of limitation was appointed, in the following manner: in writs of right no person was to declare of the seisin of his ancestor beyond the time of King Richard. The time within which certain other specified writs were to be brought was to be computed from the first voyage of Henry the Third into Gascony, and the time within which certain other specified writs were to be brought was to be computed from the coronation of that monarch (*h*).

By Statute of Westminster 1.

In thus fixing the periods of limitation with reference to past events of this character, instead of computing the time from the expiration of a specified number of years next before the time when the right or title of the

Effect of that computation.

(*e*) 3 Com. 179 *et seq.*

(*f*) Hale's Hist. Com. Law, 123.

(*g*) *Ib.* 123.

(*h*) Of the statute of Merton, Lord Brougham said, it is only different from other statutes, inasmuch as it is in substance declaratory, and in form somewhat different from that of declaratory acts in modern times. 6 Bing. N. C. 402.

(*i*) 3 Edw. 1, c. 39.

(*k*) See also Stat. Westm. 2; 13 Edw. 1, cc. 2, 46.

claimant arose, our ancestors either did not perceive, or neglected, the obvious consideration that the continued lapse of time would render necessary, from time to time, fresh periods to be fixed. Through succeeding ages, until the reign of Henry the Eighth, this defect in the law continued, and these periods remained to be computed from the events specified in the Statute of Westminster 1, and the insecurity of property for want of a reasonable limitation of time was the most extensive grievance in our civil institutions (*f*).

Statute of
Fines.

In the reign of Henry the Seventh was passed the Statute of Fines (*g*). By that statute, after the period of five years from the last proclamation of a fine, all title, claim and interest which had accrued to and in the property at the time of such proclamation, were excluded. The properties of such a fine were afterwards communicated to fines levied before the justices of assize at Lancaster (*h*); to fines levied before the high justice of the county palatine of Chester, or his deputy (*i*); to fines levied in the Portmoot Court of the city of Chester for lands within the county of that city (*k*); to fines levied before the justices of the county palatine of Durham (*l*); and to fines levied before the justices of Wales (*m*). Now, however, that fines have been abolished (*n*), these statutes have been virtually repealed, and a title by non-claim for so short a period as five years cannot now be acquired.

Computation
of the periods
of limitation
altered again
in the reign of
Hen. 8,

The periods of limitation prescribed by the Statute of Westminster 1, c. 39, continued until the reign of Henry the Eighth, when the policy of measuring the time of limitation for commencing actions by a certain number of years, computed from the time of the seisin or possession of the ancestor or predecessor of the

(*f*) 4 Q. B. 354.

(*g*) 4 Hen. 7, c. 24.

(*h*) 37 Hen. 8, c. 19.

(*i*) 2 & 3 Edw. 6, c. 28.

(*k*) 43 Eliz. c. 15.

(*l*) 5 Eliz. c. 27.

(*m*) 34 & 35 Hen. 8, c. 26, s. 40,
amended by 5 Geo. 4, c. 106, s. 26.

(*n*) 3 & 4 Will. 4, c. 74 (E.); 4
& 5 Will. 4, c. 92 (I.).

claimant in some cases, and of the seisin or possession of the claimant himself, was adopted in the place of the periods prescribed by that statute. In the thirty-second year of this latter reign was passed the statute, chapter 2, and stated in its preamble that the inconvenience of the time of limitation extending and being so far and long time past was a great occasion of much trouble, vexation and suits, so that no man, although he and his ancestors, and those whose estate he or they had, had been in peaceable possession of a long season, of and in lands, tenements and other hereditaments, was or could be in any surety, quietness or rest of and in the same without a good remedy and reformation be provided. The statute then enacted upon what seisin and within what time certain writs, and every prescription, title or claim of or to any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies or other hereditaments, and also all avowries or cognizance for any rent, suit or service, was to be brought and made, as has been already noticed in the last section.

In the reign of James the First the periods of limitation prescribed by the statutes of Westminster 1, and the 32 Hen. 8, c. 2, were still further limited by the legislature, by a statute professedly made "for quieting of men's estates and avoiding suits," which restricted the time for bringing writs of formedon in *descender*, in *remainder* and in *reverter*, and for making any entry for or into any manors, lands, &c., to twenty years next after the right or title thereto should accrue (o). —and of Jac. 1.

In actions touching advowsons, however, there was not in England, until the reign of William the Fourth, any limitation of the time within which such actions were to be brought; at least not any later than the times of Richard the First and Henry the Third. The words of the 32 Hen. 8, c. 2, indeed were comprehensive

No limitation
of time for
advowsons.

(o) 21 Jac. 1, c. 16.

enough in themselves to embrace advowsons; but the mischief which would arise from that interpretation of the language of it was apparent. For if the incumbent had lived sixty years and had died, and a stranger had presented, the owner of the advowson could not have had a *quare impedit* or *darrein presentment*; and yet the mischief was great by reason of the incumbent living so long, and so in similar cases (*p*); nevertheless the mischief was not remedied by the exposition of the words of the act, nor by the equity of the act, until the reign of Queen Mary (*q*). By the Statute 2, c. 5, passed in the last year of her reign, the act of 32 Hen. 8 was declared not to extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment* or *jus patronatus*. Besides these reasons for not extending the statute of Hen. 8 to advowsons, the time of limitation prescribed by it was based upon seisin, and therefore to extend that statute to actions in which seisin, not being issuable, could never become the subject of evidence or trial, would be absurd (*r*). So, until the present reign (*s*), there was no limitation of time for such actions in *Ireland* (*t*).

Consequence
of prescription
at common
law.

One consequence of prescription at common law was, that prescriptive rights to profits and easements to be taken in, or enjoyed over, the soil of another, could only be established by what is deemed legal proof of an adverse enjoyment for 640 years, or from the time whereof the memory of man runneth not to the contrary, or during legal memory. . . . But the limits of legal memory were fluctuating. They were long made to depend upon the period for bringing a writ of right, which, till 32 Hen. 8, was not any certain period before the commencement of the suit, but dated from some historical event fixed from time to time, as the beginning of the reign

(*p*) Co. Litt. 115 a; Plowd. 371.

(*q*) Plowd. 371.

(*r*) Co. Litt. 115 a, n. 4.

(*s*) 6 & 7 Vict. c. 54.

(*t*) See *London v. Derry*, 1 Smythe's Ir. Rep. 479.

of Henry the First; the return of king John out of Ireland; the journey of king Henry the Third into Normandy; or the coronation of king Richard the First. The last epoch being fixed by the Statute of Westminster 2, c. 46(*u*), as the time after which seisin must be proved to maintain a writ of right, it was from thence adopted as the commencement of legal memory. When 32 Hen. 8 was passed, the reign of Richard the First was adhered to, and is considered the commencement of legal memory for all purposes at the present day(*x*). And the consequence of this law was, that a right claimed by prescription could be always disproved, by showing that it did not, or could not, exist at any one point of time since the commencement of legal memory; that at some subsequent period the servient tenement, or that over which the right was exercised, and the dominant tenement, or that to which the right was attached, once belonged to the same individual, whereby the prescriptive right was extinguished(*y*), that is, when such individual had in one tenement as high and perdurable an estate as he had in the other(*z*).

Prior to the two statutes enacted in the reign of William the Fourth, and presently to be noticed, the law of England applicable to prescriptive rights, in relation to their acquisition and enjoyment, was of an anomalous character; and even since those statutes, as regulated by them, is applied and operates, as will be shown presently, in a mode differing from that when it is applied to land and other matters. That law, as applicable to such rights, was also productive of much inconvenience, and, not unfrequently, of considerable injustice. In the reign of Edward the First(*a*) the legislature adopted the reign of Richard the First as the date from which

Anomalies of such prescription,

(*) This epoch was fixed by the Stat. of Westm. 1, Edw. 1, c. 39.

(x) 1st Rep. Commis. on Law of R. P. 51.

(y) Ib.

(z) Co. Litt., 114 b.

(a) 8 Edw. 1, c. 39.

the limitation in a real action was to run, and thereupon the courts of law adopted it as the period to which, in all matters of prescription, legal memory, which till then had been confined to the time to which living memory could go back, should thenceforth be required to extend; and although in the reign of Henry the Eighth (*b*), the legislature again altered the period within which rights to real estate could be asserted by parties out of possession, the courts on this occasion omitted to follow the analogy of the recent statute, as fixing the date from which legal memory was to commence, as they had done on the passing of the statute of the 3 Edw. 1, c. 39, and in all that related to prescription adhered to the previously established standard. Hence, as time went on, the adoption of a fixed epoch as the time from which legal memory was to run was attended by grievous inconvenience and hardship. Possession however long, enjoyment however uninterrupted, afforded no protection against stale and obsolete claims on the assertion of long-abandoned rights. And as parliament failed to intervene to amend the law, the courts resorted to fictions and presumptions to supply the deficiency of the law in the matter of rights acquired by possession and enjoyment. When the doctrine of presumptions had proceeded far towards its development, the legislature at length interfered, and, as respects certain prescriptive rights at common law, fixed certain periods of possession or enjoyment, as establishing prescriptive rights. But with regard to all prescriptions or customs, not provided for by statutory enactment, the law remains as before (*c*).

—and their
consequences.

In thus fixing the time of prescription at common law from the reign of Richard the First, by analogy to the Statute of Westminster 1, c. 39, it was forgotten that the continual lapse of time would require a shifting

(*b*) 32 Hen. 8, c. 2.

(*c*) See *Bryant v. Foot*, 7 B. & S. 725, 751 *et seq.*

of the period, and the preposterous negligence of succeeding ages left that reign as the point from which legal memory must be dated. Thus the limitation, which ought to have afforded no more than a reasonable time for dispossessed persons to advance their claim, was extended to 650 years, and daily increasing. It is hardly credible that, in the nineteenth century, juries were required to pronounce a verdict on oath respecting matters full of difficulty as they stood in the year of our Lord 1189. What could follow but obscurity, confusion, litigation, and expense (d)?

In this section, and the preceding one, have been thus shown the rise and progress of these laws generally, in relation to the clergy and the laity, down to the commencement of the reign of William the Fourth. In his reign, extensive and important alterations in these laws affecting both these classes of persons in common, though not to the same extent, were made, and these alterations are proposed to be shown in the next section.

Alterations
in the law.

SECTION IV.

The Rise and Progress of Prescription, in and since the Reign of William the Fourth, as affecting the Clergy and the Laity in common.

Shortly after the commencement of the reign of William the Fourth, a royal commission was issued for investigating and considering the existing laws of this class, and their operation generally. Their importance to the interests of society, in excluding litigation and

Preliminaries
to, and the
statutes effect-
ing, the altera-
tions.

(d) 4 Q. B. 354.

quieting titles to property, induced the legislature, in making, about the same time, various extensive and important alterations in and improvements of the laws of real property; and, among others, to extend such existing laws to things and to persons which were not within them, to fix new periods within which actions and suits in relation to such property and to claims therein and thereto were to be brought, and to simplify the remedies for trying the rights to such property. These objects were accomplished, and are now, in general, regulated by the 2 & 3 Will. 4, c. 71, the 2 & 3 Will. 4, c. 100, and the 3 & 4 Will. 4, c. 27, and how accomplished will now be shown.

How rights
acquired by
time and
acquiescence.
Presumption
in favour of.

In general, a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shows that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim, without an unreasonable waste of labour and expense^(A). But the policy of the law has been, and in latter times more especially, to infer the right, where practicable, from actual user and enjoyment, and the contrary. In the case of rights of common, of rights of way, of rights to lights and to water, from the exercise of each respectively, the presumption of a legal origin has been from time to time made, and therefore made (according to Lord Mansfield, who had a large share in the establishment of this doctrine, and who went the length of saying, in *Eldridge v. Knott*^(I), that a jury should presume anything in favour of possession), because it is for the furtherance of justice and for the sake of peace when there has been a long exercise of an adverse right. In like manner, *è converso*, from non-user, and more especially from adverse user, a conclusion against the right arises. And in all these cases

(A) 10 C. B., N. S. 285.

(I) 1 Cowp. 215.

the object has been effected, until the stat. 2 & 3 Will. 4, c. 71, by recommending the jury to find in each case such legal origin as was adapted to the establishment of the right, and with the avowed object, and, as it was supposed, with the necessary effect, of fortifying and confirming this principle and practice, that act was introduced (*m*); and in the course of legislation then and since, parliament has been actuated by a desire to settle titles and rights (*n*); and the courts both of law and equity have ever endeavoured to give effect to the Statute of Limitations, and to narrow the means of taking cases out of the operation of that statute (*o*).

The occasion of the enactment of the Prescription Act (*p*) is well known. It had been long established, that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign of Richard the First; or, in other words, of a right by prescription, except proof was given of an impossibility of the existence of the right from that period. A very common mode of defeating such a right was proof of unity of possession since the time of legal memory. To meet this, a grant by a lost deed was invented; but in progress of time a difficulty arose, in requiring a jury to find upon their oaths that a deed had been executed which every one knew never existed. Hence the Prescription Act (*q*). And though the presumption did not always proceed on a belief that the thing presumed had actually taken place, yet "a technical efficacy was given to the evidence of possession beyond its simple force and operation;" and "though in theory it was mere presumptive evidence,

Prescription
Act, 2 & 3
Will. 4, c. 71.

The occasion
of it.

(*m*) 4 Q. B. 326. See also 4 Tyrw. 507. v. Jones, 4 Cl. & F. 382, 395.
(*p*) 2 & 3 Will. 4, c. 71.
(*n*) 8 Exch. 864. (*q*) Per Cur., Mounsey v. Ismay, 11 Jur., N. S. 141.
(*o*) Per Lord Brougham, Scott

in practice and effect it was a bar”(r). This statute was professedly “for shortening the time of prescription in certain cases,” and states in the preamble that the expression “time immemorial, or time whereof the memory of man runneth not to the contrary, was in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice;” and for remedying those evils modifies the effect of the existing law upon the title to rights of common and other profits or benefits to be taken and enjoyed from or upon any land, except tithes, rents, and services(s); to rights of way and other easements and to watercourses, and the use of any water to be enjoyed or derived upon, over or from any land or water(t), and also to the access and use of light to any building(u); and after the enjoyment thereof under certain specified conditions, for a specified number of years, according to the nature of the right, secures the enjoyment thereof in a qualified way, and eventually, under certain circumstances, renders them absolute and indefeasible. This statute was not extended to Scotland or Ireland, but in the present reign(x) was extended to Ireland.

Moduses and exemption from tithes, 2 & 3 Will. 4, c. 100.

The 2 & 3 Will. 4, c. 100, was professedly “for shortening the time required in claims of *modus decimandi*, or exemption from, or discharge of, tithes.” And in its preamble states that “the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a *modus*

(r) 2 Stark. Ev. 669; 4 Tyrw. 507.

(s) Sect. 1.

(t) Sect. 2.

(u) Sect. 3.

(x) 21 & 22 Vict. c. 42.

decimandi, or exemption from or discharge of tithes," and then modifies the existing law in relation to all prescriptions and claims (1) of or for any *modus decimandi*; (2) of or to any exemption from or discharge of tithes by any composition real or otherwise (*y*); and (3) every composition for tithes made or confirmed by the decree of any court of equity in England in suits to which the ordinary, patron and incumbent were parties and not afterwards set aside, abandoned or departed from, have been confirmed and made valid in law (*z*), and upon evidence showing the payment or render of such *modus*, or the enjoyment of the land without payment or render of tithes, money or other matter in lieu thereof, for certain specified periods, under certain specified conditions, the claims are rendered valid, and eventually absolute and indefeasible.

This latter statute, providing as it does for rights to tithes, and shortening the time for making out a claim in discharge of tithes, is decidedly a statute of limitations as regards tithes, though it operates in a very different way from the 3 & 4 Will. 4, c. 27 (*a*). The same remark is applicable to the 2 & 3 Will. 4, c. 71. The difference in the operation of the 2 & 3 Will. 4, c. 71, and the 2 & 3 Will. 4, c. 100, as compared with the 3 & 4 Will. 4, c. 27, will be noticed hereafter.

The persons to which the 2 & 3 Will. 4, c. 71, and the 2 & 3 Will. 4, c. 100, extend are all natural persons and all corporations aggregate and sole, spiritual and temporal, including the crown and the Duke of Cornwall. The former of these two acts also extends to the person for the time being entitled to the Duchy of Lancaster.

The 3 & 4 Will. 4, c. 27, had for its primary object, as indicated by its title, "the limitation of actions and suits relating to real property, and for simplifying the

A statute of limitations, but differing in operation from the former act, and the 3 & 4 Will. 4, c. 27.

The persons affected by the cc. 71, 100.

3 & 4 Will. 4, c. 27. The primary

(*y*) Sect. 1.
(*z*) Sect. 2.

(*a*) 2 De Gex, M. & G. 469.

remedies for trying the rights thereto;" but had other objects besides, but collateral to, and connected with, the primary object. The real property to which this statute extends is "land," including in that term manors, messuages, and all other corporeal hereditaments and tithes, when not belonging to a spiritual or eleemosynary corporation sole, whether of freehold or copyhold, or of any other tenure, and also any share, estate or interest therein, whether of a freehold or a chattel nature; and also "rent," including in that term heriots, suits and services for which a distress may be made, annuities, and periodical sums of money charged upon or payable out of any land, not being moduses or compositions belonging to such a corporation. The statute also embraces advowsons, and whether the right thereto or to any such other real property be purely legal, or merely equitable.

—and collateral objects of it.

The collateral and connected object of this act was to fix periods of limitation within which rights to the following classes of subjects were to be asserted: (1). Redemption of mortgages of land and rent; (2). Sums of money secured by mortgage, judgment or lien or otherwise charged upon or payable out of any land or rent; (3). Arrears of rent and of interest in respect of any sum of money charged upon or payable out of any land, or in respect of any legacy, and damages in respect of such arrears; (4). Tithes, legacies and other property when recoverable in any spiritual court.

Persons affected by last act.

The persons to which the 3 & 4 Will. 4, c. 27, extends are all natural persons and all corporations, aggregate and sole, spiritual and temporal, but not either the crown, the Duke of Cornwall, or the person entitled to the Duchy of Lancaster. The two former are the objects of distinct enactments (b). As respects spiritual per-

(b) Vide ante, Sect. I.

sons, however, they have, in some cases, an actual, and in others a possible, extension of the periods of limitation which are applied to the laity, and the computation of those periods is also made in a different mode to that applied in the case of lay persons.

Down to the reign of William the Fourth, the two classes of writs, *droitural* and *possessory* (*c*), were available, but for the most part seldom used. The last-mentioned statute, 3 & 4 Will. 4, c. 27, abolished all, except three or four, of these writs, but retained the use of them, in certain cases (*d*), until the 1st June, 1835, and also, in certain other cases (*e*), after that day. Thus the statute of Merton, c. 8, the statute of Westminster 1, c. 39, the statute of 32 Hen. 8, c. 2, and the statute of 21 Jac. 1, c. 16 (*f*), respectively, so far as they prescribed times within which these writs were to be sued out, are virtually repealed.

Abolition of real actions, and virtual repeal of old Statutes of Limitation.

The remedies, when the subject claimed is within the jurisdiction of any spiritual court, are to be pursued within the same period as those which for the same subjects might be resorted to in any temporal court at law or in equity (*g*).

Limitation in spiritual courts.

In general, actions, personal and mixed, were to be brought within a certain period, on account of the defect of proof which would happen by lapse of time (*h*); but such period also was not defined by law, but was also discretionary (*i*). In the reign of James the First, the legislature fixed certain periods of time within which certain actions of that nature were to be commenced (*k*), and for giving effect to certain of the enactments relating to such actions, provision was also made in the reign of George the Fourth (*l*).

Time of limitation in personal and mixed actions.

Before the passing of the act 3 & 4 Will. 4, c. 42, Before 3 & 4

(c) Vide ante, Sect. III.

(d) Sect. 87.

(e) Sect. 88.

(f) Vide ante, Sects. II., III.

(g) 3 & 4 Will. 4, c. 27, s. 43.

(h) Bract. 102 b.

(i) Ib. 51 b.

(k) 21 Jac. 1, c. 16.

(l) 9 Geo. 4, c. 14.

Will. 4, c. 42,
no time of
limitation for
actions on
specialties.

there was no statutory limitation affecting actions on bonds or other specialties. The creditor might bring his action after any lapse of time. But, to obviate the great inconvenience which such latitude of discretion in the creditor was calculated to occasion, it had become the universally recognized practice to presume, where a demand had been lying dormant twenty years or upwards, that the debt had been satisfied, though there might be no positive evidence of payment. This was a rule according with the general convenience of mankind, and, ordinarily, consistent with justice and good sense. It is very unlikely that persons having a right to recover money should remain passive for twenty years. It is far from unlikely that persons having satisfied a legal demand may have omitted to take a proper discharge, or may have lost it, if any was taken. It was a wise rule, therefore, to presume after such a lapse of time, that payment had been made, though proof of it was wanting. There might be difficulty, in the abstract, in fixing the precise time at which the presumption of payment should arise, but it was reasonable, and, indeed, necessary, to draw the line somewhere, and twenty years gradually became the period adopted. This presumption, however, would have occasioned great injustice, if it had not been liable to be met by direct evidence to the contrary, or by counter-presumptions; and, accordingly, it was always held, that an acknowledgment within the twenty years properly authenticated, and admitting the debt or part payment of principal or interest within the same period, were facts sufficient to rebut the presumption of payment arising from lapse of years; and other circumstances might be sufficient to lead to the same result (*m*).

The limitations
fixed by that
act.

In the reign of William the Fourth, the legislature also applied the principle of these laws to other matters. A period of limitation within which (1) actions of debt

(*m*) 1 De Gex & J. 17.

for rent upon an indenture of demise, actions of covenant or debt upon bonds or other specialties, actions of debt on *scire facias* upon any recognizance, (2) actions of debts upon any award where the submission is not by specialty, for fines due in respect of copyhold estates, for an escape, for money levied on any *feri facias*, (3) and actions for penalties, damages or sums of money given to the party grieved by any statute then or thereafter to be in force, was also prescribed (n). Actions of trespass, or trespass on the case, as the case may be, are also given to the personal representatives of deceased persons for injuries to the real estate of such persons committed in their lifetime within six calendar months prior to their deaths, and for which an action might have been maintained by them, and such actions may be maintained against such representatives of any person for a wrong committed by him in his lifetime to another in respect of his property real or personal (o).

Some matters not embraced by the old Statutes of Limitations are embraced by 3 & 4 Will. 4, c. 27, and new periods of limitation are given by it (p). The arrears of rent within sect. 3 of 21 Jac. 1, c. 16, are of conventional rents created otherwise than by deed (q). The arrears of rent within sect. 42 of 3 & 4 Will. 4, c. 27, are arrears of rent as defined by sect. 1 of the same chapter (r); and arrears of rent created by specialty are the subject of 3 & 4 Will. 4, c. 42, s. 3.

The principle of these laws has been still further extended in England, and applied to quieting the enjoyment of property by one sect of Protestant dissenters against other sects of them, on the basis of the teaching of certain religious doctrines or opinions, and the ob-

Matters not embraced by the old statutes now within 3 & 4 Will. 4, c. 27.

Principle extended to the property of Protestant dissenters.

(n) 3 & 4 Will. 4, c. 42.

(o) Sect. 2.

(p) See *Eyre v. Walsh*, 10 Ir. L. Rep. 346.

(q) See *Freeman v. Stacey*, Hutt. 109.

(r) See *Paget v. Foley*, 4 Bing., N. C. 679.

servance of certain modes of worship. Thus, in the present reign, the legislature enacted that so far as no religious doctrines or opinions or modes of worship shall by the instrument declaring the trusts of any meeting house for dissenters, either expressly or by reference, be required to be taught or observed, or be forbidden to be taught or observed, the usage for twenty-five years preceding any suit shall be conclusive evidence that such doctrines or opinions, or modes of worship as have for that period been taught or observed in such meeting house, may properly be taught or observed therein; and the right or title of the congregation to hold such meeting house, together with any burial ground, Sunday or day school, or minister's house attached thereto, and any fund for the benefit of such congregation, or of the minister or other officer of such congregation, or of the widow of any such minister, shall not be called in question on account of such teaching or observance (*s*).

Express repeal
of some of the
old Statutes of
Limitation.

None of the old Statutes of Limitations, so far as they apply to the same things as, and in common with, the 3 & 4 Will. 4, c. 27, are expressly repealed by it. The 32 Hen. 8, c. 2, is in effect repealed by the 3 & 4 Will. 4, c. 27. For the writs which by the former statute may be brought within the prescribed period cannot in general be now used. Some of them, however, may, under certain circumstances, be yet used. Hence, perhaps, the non-repeal of the former statute by the Statute Law Revision Act, 1863 (*t*). But the statutes of Merton (*u*), and of Westminster 1 (*x*), of Mary (*y*), of James, in relation to the limitation of real actions (*z*), have been expressly repealed by such act of 1863.

(*s*) 7 & 8 Vict. c. 45; *Att.-Gen. v. Bunce*, 37 L. J., N. S., Ch. 697.

(*t*) 26 & 27 Vict. c. 126.

(*u*) 20 Hen. 3, c. 8.

(*x*) 3 Edw. 1, c. 39.

(*y*) St. 2, c. 5.

(*z*) 21 Jac. 1, c. 16, ss. 1, 2.

The alterations which have been thus made from time to time in the laws of which a condensed view has been here noticed cannot fail to strike the attentive and thoughtful reader as exhibiting the marked, although slow, progress of wise and liberal principles in legislation directed to securing the peaceable enjoyment of property and thereby the happiness of society generally, and that, in various ways, the consolidation of these laws would be attended with great and permanent advantage.

Character of
the alterations
in these laws.

BOOK II.

POSSESSION.

Possession the basis of prescription.

IN classifying the entire system of civil rights the law of property might be divided into (a) the law of obligations and (b) the law of things, and under the former class would be included possession (a), *possessio, pedis positio*, or *quasi pedis positio* (b), which is the basis of the laws of prescription, and, by the law, as an argument of right, is ever favoured (c). And in considering those laws an examination of the nature and meaning of possession is an essential and necessary preliminary to the consideration, and for a clear and accurate comprehension and appreciation of those laws.

CHAPTER I.

THE MEANING OF THE TERM POSSESSION AS APPLIED
TO THINGS CORPOREAL AND TO THINGS INCORPOREAL.

Possession as to things corporeal.

As regards things corporeal, or *quæ tangi potest et videri* (d), by the possession of a thing we always conceive the condition in which, not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. This condition, simply and in itself, is called

(a) Sav. on Poss. B. i. s. 6.

(c) 2 Inst. 118.

(b) 3 Rep. 42; Co. Litt. 15 b.

(d) Co. Litt. 9 a.

detention, by means of which the exercise of property takes place, and is thus the condition of fact, corresponding to property as the condition of law(*e*). The most comprehensive description that can be given of the material notion of possession is detention joined with the *animus possidendi*, which latter expression must be explained differently, according to whether original or derivative possession is in question; in the former it denotes the *animus domini*, in the latter the intention to enjoy that *jus possessionis* which formerly belonged to another(*f*). And when the possessor has also the *dominium*, or property, it is so blended with the possession as, during the continuance of the latter, to be absorbed or suspended in it. Thus, if one have right or title to land, and afterwards come to the possession of the same land, his right or title is extinct or suspended in the land, for during the time that he has the possession of the land the right or title is not *in esse*(*g*). Or in other words, by the union in the same person of the *dominium* with the possession, the condition of fact is the primary object regarded, and the condition of law secondary only.

In considering possession, however, not merely as the consequence of a right, but as the foundation of rights, an important distinction in the use of the term is to be noticed and kept in view. Viewed as the foundation of rights, *jus possessionis*, or rights of possession, that is, rights springing from or pertaining to possession, differs from *jus possidendi*, or the right to possess, which is part of the theory of property(*h*). The former is often confounded with and used instead of the latter(*i*); and, as has been frequently observed, is a common and fruitful source of confused ideas on this subject.

Distinction
between *jus
possessionis*
and *jus possi-
dendi*.

(*e*) Taylor's Elements of Civil Law, 476; Sav. Poss. B. i.

(*f*) Sav. on Poss. B. i. s. 9.

(*g*) Plowd. 88.

(*h*) Sav. on Poss. B. i. s. 1.

(*i*) See 2 Com. 195 *et seq.*; 3 Ib. 177, 178, 179, 190, 191; 14 Q. B. 72, 73; Austin's Outline, xxxv. *et seq.*

Applicable to things corporeal only.

Possession, properly so called, or true possession, consists in the exercise of property (*i*), and in the common law of England is called seisin (*j*), and extends to only those things of which a man by his entry or other act may get the actual possession (*k*), and, properly, is applied to goods and chattels, and when applied to freeholds is termed seisin; although sometimes one term and sometimes the other is then used (*l*). The word, however, is always to be understood *secundum subjectam materiam* (*m*). In the 32 Hen. 8, c. 2, the word seisin is used indefinitely; and, therefore, if the statute had not gone further, the word seisin should have been construed *secundum subjectam materiam*—sometimes for actual seisin and sometimes for seisin in law (*n*). In this statute (*o*), the words are “actual possession or seisin,” and they were held to embrace both actual seisin or seisin in fact, and also seisin in law. In the Irish Nullum Tempus Act (*p*) are used the terms “actual seisin,” which in the case of *Tuthill v. Rogers* (*q*), Blackburne, M. R., thought meant actual possession; but Sir E. Sugden, L. C., having regard to those terms as applied to the property of the Crown, and the facts and nature of the case before the court, hesitated to adopt that interpretation, observing that they are omitted in the English Nullum Tempus Acts (*r*), and are first introduced into the Irish Act.

Not strictly applicable to things incorporeal.

As regards things incorporeal, that is, *quæ in jure consistunt*, or mere rights, not being susceptible of manual possession, or possession truly and properly so called, but only *quasi* possession, the term possession is not strictly applicable to them. With respect to all

(*i*) Bract. lib. 2, c. 17, s. 2; Savigny, B. i. s. 12, p. 131; B. ii. s. 25, p. 213, by Perry.

(*j*) Co. Litt. 153 a.

(*k*) Co. Litt. 15 b; 8 Rep. 42.

(*l*) Co. Litt. 17 a; Bac. Uses, 42.

(*m*) Per Buller, J., 1 T. R.

430.

(*n*) *Bevil's case*, 4 Co. 8, 10.

(*o*) See also 33 Hen. 8, c. 20,

a. 2.

(*p*) 48 Geo. 3, c. 47.

(*q*) 2 Jo. & La T. 36.

(*r*) 21 James 1, cc. 2, 14; 9

Geo. 3, c. 16.

these rights generally, which, as several elements of property are opposed, under the names of *jura* or *jura in re*, to *dominium*, as the totality of all real rights generally, no *animus domini*, and consequently no true possession, can be ascribed to him who enjoys them. But as the enjoyment of them may be interfered with in exactly the same way as the enjoyment of property itself, it follows that possession may have reference to other rights besides property (*s*). As, however, true possession consists in the exercise of property, so this *quasi* possession consists in the exercise of a *jus in re*; and as in true possession we possess the subject itself, *possessio corporis*, but not the property, we ought not properly to use the term possession of a servitude, *possessio juris*. But as we have no other word to which we can couple the possession in this case, nothing remains but to use the above improper expression, and that nothing else is meant by it than the exercise of a *jus in re*, which stands in the same relation to the actual *jus in re* as true possession does to property (*s*).

(*s*) Sav. Poss. B. i. s. 12.

CHAPTER II.

THE NATURE OF POSSESSION AS REGARDS THINGS CORPOREAL, OR POSSESSION PROPER.

General notion of. POSSESSION consists in physical power, associated with consciousness, and therefore in every case of acquisition of possession two things are necessary, a corporeal relation and *animus*. They must also concur for the continuance, which, therefore, must depend upon the same association as the acquisition, of possession (*a*).

Possession proper. Possession is a condition of fact, the origin and source of certain rights, and indeed is at once both a fact and a right. In itself, according to the general notion of it before given, and according to its nature, in so far as it consists of a mere nonjuridical condition of fact, or simple detention, is a simple fact; but, in so far as rights are bound up with the mere existence of that condition of fact, is a right (*b*); and true possession consists in the exercise of property (*c*). The rule established by the Twelve Tables of the Roman Law was that mere possession, independent of all right, is the foundation of property itself, and that whoever possessed anything for one or two years became the owner of it.

Qualities of possession. In the Roman Law possession must have been, and in the present law of Scotland must be, acquired *bond fide* and by a just title; but in English law is subject to no such qualifications. On some occasions and for some purposes, indeed, in courts of equity, the nature

(*a*) Sav. Poss. B. iii. s. 31.

(*b*) Sav. Poss. B. i. s. 12.

(*c*) Bract. Lib. 2, c. 17, s. 2;

Savigny, B. i. s. 12; B. ii. s. 25, p. 213, by Perry.

of possession, whether *bonâ fide* or the contrary, is an element influencing the decision of the court. "A *bonæ fidei* possessor," said Lord Hardwicke (*d*), "is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title." In the case before the court, the person in possession was not in that position.

The inquiry into the nature of the possession in our law is only material with a view . . . to ascertain whether it has been during the period within which the plaintiff in a possessory action has to show that he has had possession of, or made an entry into, the estate within the limited period, such as to make good what he is to prove in order to entitle him to his action; viz., whether it shows him to have had, during any part of the period, by himself or by another, the actual possession; or whether the estate has, during the whole time, been in fact held and enjoyed by an adverse claim of title, that is, a claim not consistent with the title of the plaintiff (*e*).

Object of the inquiry in our law as to the nature.

With respect to the title to lands, said Lord Redesdale (*f*), there are three points: first, who has possession of the freehold; then, who has the right to that possession (because possession may be in one and the right to it in another); and, lastly, who has, what is the highest right, the right of property. The right to the possession may be in one man, and the right of property in another; there may exist a mere right which can only be asserted by an action according to the nature of the right; the possession which has been gained having either continued so long, or been accompanied with such circumstances, that the right of property is divested for the purpose of entering, and the person claiming the right of property is, in the language of the law, put to

As applied to lands.

(*d*) *Dormer v. Fortescue*, 3 Atk. 134; see also *Hicks v. Sallitt*, 3 De Gex, M. & G. 782.

(*e*) 2 Jac. & W. 164.

(*f*) 2 Sch. & Lef. 97.

his right, and if he attempts to gain the possession in any other way, he is a wrong-doer; he can only assert his right in a court of justice.

Is in fact, or
in law:

In our law, possession or seisin, as a condition of fact, although commencing in wrong, if continued for the requisite period, ripens into and confers on the possessor a lawful title to the property possessed, and is either in deed or fact, that is, actual (*g*), or in law (*h*).

—in fact,

Possession in fact is acquired either by an actual entry into land or into some part in the name of the whole (*i*), or by the receipt of the rents or profits from the tenant of it (*k*), and either by some person on his own behalf or on behalf of another (*l*), or by the entry of a lessee on a demise by a lessor, or by a recovery and execution thereon (*m*). For some purposes indeed, e. g., the assignee of a lease may, without actual entry, become liable to the rent and covenants of the lease by having a "legal possession" equivalent to an actual entry, that is, having accepted the thing assigned by accepting the assignment of it (*n*).

—in law.

Possession in law is where land comes to a person by act of law, as to an heir by descent from his ancestor in possession. There the heir has only the right to the possession, and to acquire it in fact must enter into the land or into a part in the name of the whole (*o*). So by the grant, at common law, of a rent, the grantee until payment of it, or render of something in the nature of seisin, has a seisin in law only (*p*), and an assignee of the grantee is in the same position (*q*). But if the

(*g*) See *Bushby v. Dixon*, 3 B. & Ald. 298; 2 Jo. & La T. 77.

(*h*) Co. Litt. 29 a.

(*i*) 3 Wils. 516.

(*k*) Co. Litt. 15 a, 157 a, 243 a; 3 Wils. 516; *Bushby v. Dixon*, 3 B. & C. 299; 1 Jones & La T. 76.

(*l*) *Ratcliffe's case*, 3 Co. 42.

(*m*) Com. Dig. tit. Seisin (A. 1),

(A. 2).

(*n*) *Williams v. Bosanquet*, 2 Brod. & B. 238.

(*o*) Co. Litt. 266 b, 277 a; 3 Barn. & C. 305.

(*p*) Co. Litt. 160 a, 314 b, 315 a; *Murray, App., Thornley, Resp.*, 2 C. B. 217.

(*q*) *Hayden, App., The Overseers of Tiverton, Resp.*, 4 C. B. 1.

rent be limited by way of use, the grantee is, by the grant alone, seised of the rent in fact (*r*).

Possession properly so called is not applicable to estates in equity, but follows the legal ownership; and the actual possession, when in the equitable owner, is regarded as merely the possession and held by the permission of the legal owner. And although there is no splitting of equities (*s*), yet an equitable estate is very different from an equitable right to have a conveyance of the legal estate (*t*), as under articles for a settlement (*u*). The nature of possession, as between owners of these different kinds of estates, or trustee and *cestui que trust*, will be more particularly noticed in a subsequent section of this chapter.

Inapplicable to equitable titles.

In many acts of parliament, said Lord Thurlow (*x*), an equitable estate is considered the same as if it were a legal estate, and he thought that the word *seisin* will extend to being seised of an estate in equity. In *Tucker v. Thurstan* (*y*), Lord Eldon, C., held that the owner of an equity of redemption, who had granted an annuity for lives out of the lands in mortgage, was a grantor seised in fee simple in possession within the 8th sect. of the Annuity Act, 17 Geo. 3, c. 26, or that the case was not within the act.

Possession, to confer a right, must be adverse against a person having title (*z*), that is, be inconsistent with the right of such person to the possession (*a*); and whilst the possessor stands in no fiduciary relation to such person, the possession, even taken by consent, founded on mistake, is not, on those grounds, the less adverse (*b*). Possession, however, is ambiguous (*c*),

Must be adverse to confer right.

(*r*) *Heelis*, App., *Blain*, Resp., 18 C. B., N. S. 90.

(*s*) See *Nouaille v. Greenwood*, 1 T. & R. 206.

(*t*) Per Holroyd, J., 1 B. & Ald. 564. See also 2 B. & C. 183.

(*u*) *Stewart v. Marquis of Conyngham*, 1 Ir. Eq. Rep., N. S.

534.

(*x*) 2 Bro. Ch. Rep. 268.

(*y*) 17 Ves. 131.

(*z*) 1 B. & Adol. 259.

(*a*) 2 Jac. & W. 164.

(*b*) Per Lord Eldon, C., 2 Jac. & W. 191.

(*c*) 1 Swanst. 359; Jac. 505.

and may be long and uninterrupted without being necessarily adverse. Thus, possession for thirty-five years against a tenant in tail and his ancestor was presumed to be, under a conveyance by the ancestor, not operating a discontinuance of the estate tail (*d*). So if, in instruments, the persons between whom they are made, are willing to state, and state the character and title under which they have had and have possession, their possession must be attributed to the character and title which they so state (*e*). When one person against the will of another person holds possession claimed by such other, and when required to relinquish it refuses, and more especially when he resists proceedings instituted in a court of justice for the recovery of the possession, it can never afterwards be contended that a party so acting does not hold adversely against such a claimant; and he cannot more effectually or unequivocally signify his intention of holding adversely than by contesting, in a court of justice, the right of a party claiming title against him (*f*). A right of way over land in one person is not adverse to, but is consistent with, the possession of the land itself in another person (*g*). The term "adverse possession," though of a known signification, is not used in pleading, and very rarely,—I think only once or twice very recently,—in the language of the statutes (*h*). It is a relative phrase and means such possession as is inconsistent with another's right, but may consist in various things, and without setting forth by whom, or how, and in what manner adverse, an averment of such a possession is very vague (*i*).

"Adverse,"
what.

Adverse in
former sense
no longer
necessary.

Adverse possession, in the sense in which it was formerly used, is no longer necessary to constitute a

(*d*) *Doe d. Smith v. Pike*, 3 B. & Ad. 738.

(*e*) See *Dillon v. Parker*, 1 Swanst. 359, on appeal, Jac. 505.

(*f*) Longf. & Town. Ir. Rep. 130.

(*g*) 1 Jones's Ir. Rep. 127.

(*h*) 3 & 4 Will. 4, c. 27, ss. 15, 30, 31, 33; 6 & 7 Vict. c. 54, s. 4.

(*i*) Per Lord Brougham, C., *Hardman v. Ellames*, 2 Myl. & K. 789.

title in the possessor. Mere possession may be, and is, sufficient under many circumstances to give a title adversely; and although perhaps now no better expression than adverse possession can be used, yet possession is not adverse in the sense in which that phrase was used before the recent Statutes of Limitation passed (*j*). The 3 & 4 Will. 4, c. 27, has put an end to all questions and discussions whether possession be adverse or not (*k*).

It is extremely important to see that a possession once taken shall be held according to the right under which it was taken, and shall not be changed into a possession according to another right, except in those cases where the law clearly acknowledges the right of remitter (*l*). If possession be originally lawful the possessor cannot change the ground of and treat the possession as unlawful (*m*). Thus a person, claiming an estate for life under a will and entering on the lands, cannot afterwards say that the possession was unlawful, so as to give his heir a right against the remainderman (*n*). So possession which can be referred to a title, which may be either rightful or wrongful, shall be referred to the rightful one (*o*).

To be held according to its character at the commencement.

The term land, being *nomen generalissimum*, everything subjacent, whilst united in title to the land, is included in it (*p*). *Primâ facie* the possession of the land includes the possession of the things subjacent, but the title to them may be in another person. Thus, the possession of mines under copyhold land is in the tenant, but the title to them may be in the lord (*q*), and so as to the mines under such

Possession of lands includes things subjacent;

(*j*) 2 De Gex, M. & G. 476.

(*k*) 11 Ad. & E. 1015.

(*l*) Per Lord Redesdale, 2 Sch. & Lef. 109.

(*m*) 1 Sch. & Lef. 427.

(*n*) See *Anstee v. Nelins*, 1 Ex., N. S. 225.

(*o*) 2 Ball & B. 272; *Doe d. Milner v. Brightw'n*, 10 East, 583; *Thomas v. Thomas*, 2 Kay & J. 79; *Keene v. Deardon*, 8

East, 248; *Doe d. Smith v. Pike*, 3 Ad. & E. 738.

(*p*) Co. Litt. 4 a; Touch. 90; *Rombotham v. Wilson*, 8 H. L. C. 348.

(*q*) *Townley v. Gibson*, 2 T. R. 701; *Bourne v. Taylor*, supra; *Rowe v. Brenton*, 8 B. & C. 766; *Lewis v. Branthwaite*, 2 B. & Ad. 437.

copyhold land as is commonly designated as customary freehold (*r*); or the possession may be in a lessee, and the title to them in the lessor (*s*); or the possession may be in owner of the land, and the title to them in another under his licence to take them (*t*); or both the possession of, and the title to, the mines may be absolutely severed from the possession of, and the title to, the land, as in a grant of the mines by the owner of the land to another person, or on a conveyance from such owner of the land with an exception of the mines (*u*). So the mines under lands allotted on an inclosure may belong to, and be in the possession of, the lord of a manor, and only the surface of the land the property and in the possession of the allottee (*x*).

—of part of
waste, mines,
when of the
whole.

As acts of ownership in any part of a continuous waste or common are evidence of ownership as to all parts of it (*y*), so, in the case of mines, in favour of right, or in support of the agreement of parties, that possession of part of them is possession of the whole is matter of legal presumption (*z*). For in the case of a grant of the minerals in a large district, it is not in the nature of things that the parties should be prepared to prove possession taken as to every part: minerals once taken can never be taken again; they are gone for ever; and therefore to require proof of actual enjoyment of every part would be in effect altogether precluding the setting up of a title by enjoyment (*a*). That presumption, however, where it would be against or subversive of right or the agreement of parties, is

(*r*) *Duke of Portland v. Hill*, 12 Jur., N. S. 286; L. R., 2 Eq. Ca. 765, S. C.

(*s*) *Saunders' case*, 5 Co. 12. See also *Keyse v. Powell*, 2 E. & B. 145.

(*t*) *Doe d. Hanley v. Wood*, 2 B. & Ald. 724; *Muskett v. Hill*, 5 Bing., N. C. 694; *Roberts v. Darey*, 4 B. & Ad. 65.

(*u*) *Touch. 77, 78*; *Earl of Cardigan v. Armitage*, 2 B. & C.

197; *McDonnell v. McKinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Wilkinson v. Proud*, 11 M. & W. 33; *Keyse v. Powell*, sup.

(*x*) *Micklethwait v. Winter*, 6 Ex. 644.

(*y*) See 1 Scott's N. R. 594.

(*z*) *McDonnell v. McKinty*, supra.

(*a*) *Taylor v. Parry*, 1 Scott, N. R. 589; *Doe d. Earl Falmouth v. Alderson*, 1 M. & W. 210.

never made (b). In the case of *Kyle v. O'Connor* (c) a lease for lives renewable for ever of certain quarries within a manor was granted in 1683. In 1744 a part of the manor and also the right of quarrying on such part were sold and conveyed in fee by persons entitled to the manor, but without any reservation of or any reference to the lease. The lease was renewed from time to time by the lessees and those claiming under them. In 1864 the persons entitled under the lease and renewals presented a petition to the Court of Chancery for a renewal of the lease by the persons then entitled under the conveyance of 1744 and other persons, alleging the exercise of the right of quarrying over the manor undisturbed from 1683 up to 1862, but adduced no direct evidence that the quarries had been opened and worked at the time of the conveyance of 1744. No evidence was adduced showing the respondents to claim the right to the exclusion of all other persons, but the respondents appeared to have acquiesced in the working of the quarries by the petitioners. The exercise of the right unquestionably and indisputably, as long as living memory extended, and a title justifying such exercise, without any evidence to displace the only title which could legalize the enjoyment, were found, and hence the court concluded that there was that user of the right in 1744 which would give notice of the instrument under which the title of the petitioner was derived, and decreed a renewal; but, as regarded the land and quarries included in the conveyance of 1744, *except the quarries open* in certain lands, refused the renewal, against the persons claiming under that conveyance.

Actual possession by enjoyment of the profits is, in itself, a bar, and a transfer of the property, without corroboration by intermediate conveyances (d); for the law inclines rather to long possession without showing

Effect of possession in fact.

(b) See 2 B. & Ald. 737; (c) 16 Ir. Ch. R. 46.
M'Donnell v. M'Kinty, *supra*. (d) 1 Jo. & La T. 303.

any deed than to an ancient deed without possession (*e*), and whatever may be the nature of the possession, the only question now is whether the period of limitation prescribed has elapsed since the right accrued (*f*). The 3 & 4 Will. 4, c. 27, was intended to quiet possession, by removing all doubts or difficulties with respect to the protection arising from length of time in cases of long and uninterrupted possession (*g*). In *Poole v. Griffith* (*h*), the court said, that as cap. 27 bars not only the remedy but also the right, the claimant must show, within that time, not only a right, such as may exist on paper or parchment, but a title to the possession unbarred by the statute (*i*); and that when such a title is shown, the defendant, to displace it, must, on his part, show a title sufficient for that purpose, and cannot rest on simple possession. An adverse possession for twenty years would sustain such a title, but must be proved. But in the same case, on error (*k*), Pigot, C. B., said he saw nothing in the 2nd and 3rd sections of the statute, or in the authorities by which they have been expounded, to abridge the protection given to possession, or to shift from a plaintiff the burden of *proving a possessory title unbarred by the Statute of Limitations*; or, in other words, to enable him to recover upon the weakness of the title of his adversary instead of upon the strength of his own. But to establish a defence under the statute it is not sufficient to show that the plaintiff having title is out of possession, but that some other person has been in possession for the required period of twenty years (*l*).

(*e*) 2 Inst. 118.

(*f*) 2 M. & W. 911; 11 Ad. & E. 1015; 1 Longf. & Town. Ir. Rep. 131.

(*g*) Per Lord Plunket, C., *Browne v. Bishop of Cork*, 1 Dru. & Wal. 700, 716.

(*h*) 15 Ir. C. L. R. 239.

(*i*) *Nepean v. Doe d. Knight*, 2 M. & W. 894.

(*k*) 15 Ir. C. L. R. 288.

(*l*) *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Poole v. Griffith*, on error, *supra*.

CHAPTER III.

THE NATURE OF POSSESSION AS REGARDS THINGS INCORPOREAL, OR OF POSSESSION QUASI, OR ANALOGOUS TO POSSESSION PROPER.

IN considering possession in relation to things incorporeal, or *quæ tangi non possunt, nec videri* (a), must be kept distinctly in view, and more so perhaps, if possible, than when considering it in relation to things corporeal, the distinction noticed in the last chapter between the right of possession, *jus possessionis*, and the right to possess, *jus possidendi*; and this *jus possessionis*, or the rights springing from, or pertaining to possession, requires, in its relation and application to things incorporeal, to be clearly conceived.

Jus possessionis and *jus possidendi*, as to things incorporeal.

Things corporeal only, says Pothier (b), are susceptible of possession. *Possideri possunt quæ sunt corporalia*. Things incorporeal, that is, *quæ in jure consistunt*, are susceptible, not indeed of possession truly and properly so called, for they do not fall under the cognizance of the senses, *tangi non possunt, nec videri*, but of only *quasi* possession: *jura non possidentur, sed quasi possidentur*; and this possession consists in only the enjoyment of the rights by the person entitled to them, and that enjoyment stands in the place of possession (c), and is termed *quasi* possession. And as true possession consists in the exercise of property, so this *quasi* possession consists in the exercise of a *jus in re*,

Quasi possession, what.

(a) Co. Litt. 9 â.

(b) Œuvres, tom. 4, p. 535.

(c) 1 Ib. part v. chap. i. s. 316.

Incorporeal rights divided into affirmative and negative.

and such exercise stands in the same relation to the actual *jus in re*, as true possession does to property (*d*).

Incorporeal rights have been divided into two classes, positive or affirmative and negative. The enjoyment or *quasi* possession of the former class consists in a distinct independent act, and, in relation to these, the *juris quasi possessio* is acquired by the act which constitutes the right being exercised in fact as a right, and is not founded on every act of user, but only on an user as *of right*, or an user grounded on juridical conditions and on a kind of necessity, as distinguished from the accidental user in fact (*e*). In the other class of incorporeal rights, those of a negative character, whoever possesses them may require the owner of property to abstain from some act that, as owner, he would be justified in exercising, and the *juris quasi possessio* of these may be acquired either by the adverse user of them or by legal title, that is, by resistance to the attempt to obstruct the user or by any juridical proceeding, which, in its form, is capable of transferring the right of easement, whether in the given case it be actually transferred or not (*f*).

Things incorporeal, whether to be designated easements or servitudes.

Savigny, in his Treatise on the Law of Possession, in relation to things incorporeal designates them by the term easement,—using that term, however, in a wider sense than that in which it is used in our law,—and divides them into personal easements and real easements or easements appurtenant; and of the former class he observes that they have this peculiarity, that the enjoyment of them is bound up with the natural possession of the subject itself, as in cases of *usus* and *usufructus*; and of the latter class he observes that they form special exceptions to the general rule respecting property belonging to another; for either the party who possesses the right of easement may himself do something, which

(*d*) Sav. B. i. s. 12, p. 131; 601.

B. ii. s. 25, p. 213, by Perry;
Bract. Lib. 2, c. 17, s. 2; 3 Rep.
41 b; Co. Litt. 15 b; Cro. Car.

(*e*) Sav. Poss. B. v. ss. 47, 48.

(*f*) Sav. Poss. B. v. s. 48.

otherwise would be forbidden him, *servitus quæ in patiendi consistit*, or the owner must refrain from doing something which otherwise would be lawful to him, *servitus quæ in non faciendo consistit*. The first kind of easements are called positive or affirmative, the second negative or prohibitory rights. With positive easements, that which may be done by virtue of the easement may be an independent act in itself, and only indirectly relate to the land of another, such as *jus itineris*; or it may be inseparably connected with the land of another, such as *jus tigni immittendi* (g).

In the Roman law all these easements are designated *servitudes*, *Jus quo res alterius rei vel personæ servit* (h), or those rights which, as detached portions of property, *jura* or *jura in re*, are opposed to property itself, as the totality of real rights (i). It is said, however, that the term *servitude* is used to express both the right and the obligation; that the term *easement* generally expresses the right only, and that an *easement* differs from an *obligation*, inasmuch as it gives a right over the land of another, while an *obligation* gives a right only against the owner (k). In reality, however, the term *easement*, equally with the term *servitude*, expresses both the right and the obligation, for the *easement*, as regards the dominant tenement, is a right, and, as regards the servient tenement, is an obligation, and therefore does not differ from, but includes an obligation, though that is the more general term.

In these cases, as with possession proper, the acquisition and continuance of the right depend upon a corporeal relation jointly with *animus*. The second of these conditions is to be defined, in compliance with the rule, exactly in the same way, as to all these rights, as with possession itself. Thus no *juris quasi possessio*

Quasi possession, how acquired.

(g) Sav. on Poss. B. v. ss. 47, 48.

(h) D. 8, s. 1.

(i) Sav. Poss. B. i. s. 9.

(k) Gale on Easements, 2, 3rd ed.

can be acquired without *animus possidendi*, and the right of possession never arises upon a mere *animus possidendi* (l).

Advantages of. The right of possession, *jus possessionis*, also consists in, besides other advantages, the protection given to the mere exercise of property against certain forms of disturbance. These forms of disturbance and that protection may be conceived in a similar manner in relation to those rights also which, as individual elements of property, have been severed from the property itself, *jura in re*, or things incorporeal (m).

Subjects of here. The subjects to which the principles of this chapter chiefly have reference are those rights which, as detached portions of property, *jura* or *jura in re*, are opposed to property itself as the totality of real rights (n), or things incorporeal, such as those which are the subjects of the acts of the British legislature, the 2 & 3 Will. 4, cc. 71 and 100, as distinguished from the subjects of the act of the same legislature, the 3 & 4 Will. 4, c. 27. The chapters 71 and 100 of 2 & 3 Will. 4, do not, however, embrace advowsons. These are one of subjects of the 3 & 4 Will. 4, c. 27, and to be noticed hereafter.

(l) Sav. Poss. B. v. s. 46.

supra, p. 71.

(m) Sav. Poss. B. v. s. 46 ;

(n) Sav. Poss. B. i. s. 9.

CHAPTER IV.

POSSESSION PROPER AND QUASI POSSESSION AND THE
EFFECT THEREOF, AS BETWEEN THE CROWN, OR THE
DUKE OF CORNWALL, AND A SUBJECT.

POSSESSION, as a condition of fact, in relation to things corporeal as between the Crown and a subject, is governed by principles differing from those applicable to possession as between subject and subject. The difference—until in the time of James the First the legislature to some extent placed the Crown, as will be presently seen, in the same position as regards its property as the subject—was chiefly at common law. For as in the Roman law (*a*), the domains of the State were not at one time liable to prescription, so by the common law of England the rule was, and in some cases still is, *nullum tempus occurrit regi* (*b*). Although however the Crown, with a few exceptions, is now subject to legislative provisions protecting the possession by, and giving title to, the subject after certain periods; yet, inasmuch, as in the excepted cases the principles of the common law in relation to the property of the Crown are still applicable, and as the position of the Crown and the subject, as respects the possession of the lands of the former by the latter, varies with the duration of that possession, as it is less than twenty years, and as it is for that period and upwards, these principles and their general bearing and operation in connexion with the subject of this Chapter will be here considered.

Difference of
possession as
between Crown
and subject,
and subject
and subject.

(*a*) C. 7, 88, 2.

(*b*) Plowd. 248, 261, 264, 321,
559; Co. Litt. 41 b, 57 b, 90 b,

118 a, 294 b, 344 b; 8 Pri. 78;
ante, Book I. Chap. II. Sect. I.

Possession of the Crown—in law and in deed.

The possession of the Crown is of two sorts—in law and in deed; in law, merely by force of law, without office or any other matter of record; in deed, by actual taking by an officer, though without office found (*c*). Where the possession is in law merely, an inquisition or office is necessary to enable the Crown, either by entry or by action, according to the nature of the case, to acquire the possession in deed; and until office found the title of the Crown is not of record, and without being of record the Crown cannot transfer, or by mere grant convert into a possession in deed, such possession in law (*d*). Such offices are of two kinds—one of entitling, the other of instruction (*e*). The nature of these offices, and in what cases they are and are not necessary, would involve an examination of this abstruse subject too extensive for this work. The learning on this subject will be found in Staundforde (*f*), and the Reports of Lord Coke and of Plowden (*g*), and the entire subject will be found fully and ably treated elsewhere (*h*).

How seisin intended, and how affected by entry.

Wherever the king is said generally to be seised, it shall be intended a seisin *jure coronæ* (*i*). But whether he be or be not so seised, as his prerogative requires matter of record to bring land to his hands, so it requires matter of record to remove or take it out of him (*k*); and at common law he could never be put out of possession by the wrongful entry of a subject (*l*); and against the king there is no tenant at sufferance, but he that so enters or holdeth over is an intruder upon the king (*m*);

(*c*) Staundf. Prærog. Reg. 54 b, c. 18.

(*d*) 18 Hen. 6, c. 6; Staundf. Prærog. Reg. 54 a; *Doe d. Hayne and Reg. v. Redfern*, 12 East, 96; *Doe d. Watt v. Morris*, 2 Bing. N. C. 189; 2 Scott, 276, *S. C.*

(*e*) *Page's case*, 5 Rep. 51 b.

(*f*) Prærog. Reg.

(*g*) *Page's case*; *Reynel's case*, 9 Rep. 95 a; *Willion v. Berkley*, Plowd. 223; *ib.* 213, 263, 264,

485, 486, 488, 489.

(*h*) See Chitty's Prerogatives of the Crown.

(*i*) 7 Mod. 78; Cro. Jac. 248; Skinner, 603; 4 Cl. & F. 548.

(*k*) Plowd. 213, 229, 484, 488; 4 B. & C. 591; 1 Turn. & R. 216.

(*l*) Plowd. 546, 559; Co. Litt. 41 b, 57 b, 227 b; 2 Bing. N. C. 196; 1 Jo. & La T. 77.

(*m*) 2 Leon. 206; Co. Litt. 57 b; 1 Jo. & La T. 77.

for, although the intruder acquires or has the possession in fact, yet, until the reign of Jac. I., he had none of the rights as if the land belonged to a subject (*n*). Hence the difficulty in interpreting the terms "actual seisin" in the Irish Nullum Tempus Act (*o*). But as an intruder against the Crown is not merely a person who comes in without any legal sanction from the Crown, but one who comes in, if not against the will, at least against the knowledge of the Crown, a person in the actual possession of the land of the Crown and by the permission of the Crown is not an intruder (*p*). And in the case of lands to which the Crown has title, but cannot enter upon until office found, as where the owner of them dies without an heir (*q*), or where lands are taken by an alien, that is, where the possession is in law merely, there can be no intrusion upon the possession of such lands as against the Crown, nor any grant of them by it (*r*), without office found, which, coupled with entry or action, gives the possession in fact (*s*), although, when found, intrusion may be by relation (*t*). In some cases, the actual possession is vested in the Crown by statute without office, as on forfeiture for treason (*u*).

Although, however, the king can never be put out of possession by the wrongful entry of a subject, yet it may be doubtful whether this general expression did, at any time, intend more than that the remedies given by the law to the king for such a wrong were remedies which supposed him to be still remaining in possession; such as an information of intrusion, which is in the nature of an action of trespass *quare clausum fregit*;

Meaning of
the Crown
being dispos-
sessed.

(*n*) Plowd. 546.

(*o*) 48 Geo. 3, c. 47. See *Tut-
hill v. Rogers*, 1 Jo. & La T. 36.

(*p*) 4 B. & C. 590.

(*q*) *Doe v. Redfern*, 12 East,
96.

(*r*) Note (*d*), *supra*, p. 86.

(*s*) Plowd. 229.

(*t*) Ib. 263, 264, 488, 489. See
also *Payne's case*, 2 Leon. 205.

(*u*) 33 Hen. 8, c. 20; Dy. 145,
6; Plowd. 486; 1 Co. 42 a; 5 Ib.
52 a; Hob. 231, 234; *Sheffield v.
Ratcliffe*, Ib. 334; 12 East, 114.

or the right to charge the trespassers in account as his bailiffs, for the profits of the premises of which the possession was so wrongfully taken (*x*).

Position at common law of a possessor against the Crown.

At common law, as against the Crown, the possessor cannot rely on his mere possession (*y*), but must prove his title (*z*); and where the possession of the subject is for a period short of twenty years this rule, so far as regards the fact of naked possession independent of title, is still in full force.

Since 21 Jac. 1, c. 14 (E.); 15 Car. 1, c. 1 (I.).

But where the possession of the land of the Crown by a subject has continued for twenty years and upwards without disturbance on the part of the Crown, the rule of the common law, requiring the possessor to prove his title, has been modified by the legislature, so as that when the Crown has been out of possession for, or has not taken the profits of any "lands, tenements or hereditaments" within, twenty years before any information of intrusion brought to recover the same, the defendant may plead the general issue, shall not be pressed to plead specially, and shall retain the possession he has when the information is exhibited until the title be tried, found or adjudged for the Crown; and where an information of intrusion may fitly be brought, no *sci. fa.* shall be brought whereunto the subject shall be enforced to plead specially (*a*).

Since the Statutes of Limitation in relation to the possessions of the Crown (*b*), it seems impossible to contend, that there may not be an adverse possession to the Crown in point of fact, whatever may be its construction in point of law. These statutes, indeed, and more particularly the former two, contain a legislative

(*x*) 2 Bing. N. C. 197.

(*y*) 4 Inst. 166.

(*z*) Com. Dig. Prærog. D. 74; Dyer, 238 b.

(*a*) 21 Jac. 1, c. 14 (E.); 15 Car. 1, c. 1 (I.); *Att.-Gen. v. St. Aubyn*, Wightw. 236. See also

Att.-Gen. v. Hallett, 1 Ex. 211; *Doe d. Watt v. Morris*, 2 Bing. N. C. 89; 2 Scott, 276, *S. C.*

(*b*) 21 Jac. 1, c. 14; 15 Car. 1, c. 1 (I.); 9 Geo. 3, c. 16 (E.); 48 Geo. 3, c. 47 (I.).

recognition, that there may be an adverse possession in fact against the Crown, however in point of law, with respect to the nature of the remedy, the possession may still be considered in the king (*c*).

The possessor of lands of the Crown is relieved by these statutes from proving and pleading specially, in an information of intrusion by the Crown to recover them, his title to such lands. He may plead the general issue, and the mere averment by the Crown in the information, without any evidence, of having been in possession within twenty years last past, is insufficient to compel the defendant to plead specially (*d*). But he must maintain his possession and show it to be legal. He cannot deny the title of the Crown, and if he plead specially he must show title in himself (*e*). The question whether the Crown has or has not been in possession within twenty years last past is to be tried by a jury (*f*).

How those statutes affect the possessor.

The defendant having pleaded the general issue must show at the trial that the Crown was not in possession within twenty years, otherwise judgment will pass against him. That is the only way of trying the important fact of such a possession by the Crown. A demurrer to such a plea is not admissible. The Court of Exchequer in Ireland thought the proper course on the part of the Crown to be to apply to the court to set aside the plea, grounded on an affidavit of possession (*g*).

The title of the Crown may be tried in the information of intrusion, and need not be first found by inquest of office (*h*). And if the Crown show itself in posses-

Title of the Crown, how to be tried in information of intrusion.

(*c*) 2 Bing. N. C. 197.

(*d*) *Att.-Gen. v. Mitchell*, Hayes, Ir. Rep. 551.

(*e*) 1 Ex. 219.

(*f*) Per O'Grady, C. B., *Att.-Gen. v. D'Arcy*, Hayes, Ir. Rep. 88; Joy, C. B., *Att.-Gen. v. Mitchell*, Ib. 551.

(*g*) *Att.-Gen. v. Mitchell*,

supra; *Att.-Gen. v. D'Arcy*, *supra*.

(*h*) *Att.-Gen. v. Parsons*, 2 Mee. & W. 23. This case was decided *ex parte*, and, as to the real question involved, under a mistake occasioned by an inapplicable quotation of a case in Savile. 8 Mee. & W. 191.

sion within twenty years, it is entitled to a verdict; for title can never be discussed under the plea of the general issue (*a*).

Position of the
Crown since
these statutes.

Since this alteration of the common law, a possession of land of the Crown for twenty years without disturbance places the Crown in the situation of a subject; and though the Crown proves intrusion, the possessor is entitled to hold the possession until the Crown proves title also (*b*).

On an intrusion upon the Crown the actual possession is acquired by the intruder (*c*), and, after twenty years, continues in him "until the title has been tried, found or adjudged for the king" (*d*), but in point of law the possession, with respect to the nature of the remedy, is still considered to be in the Crown (*e*); and a grantee from the Crown after the intrusion is in no better or more favourable position than the Crown itself, and must recover such possession by a similar remedy through and in the name of the Crown, and cannot recover by ejectment in his own name (*f*).

Remedies of
an intruder
against wrong-
doers.

Ejectment.

The possession acquired by intrusion upon the lands of the Crown has been said to be insufficient to enable the possessor to maintain, even against a mere wrongdoer, an action of ejectment (*g*). This proposition, however, would seem to admit of qualification. If the possession has continued without disturbance for twenty years, he may retain, as just shown, the possession, even against the Crown, until the title be tried, found or adjudged for the Crown; and therefore such possession would seem to be sufficient for the possessor to maintain, against a mere wrongdoer, such an action.

(*a*) *Att.-Gen. v. Ward, Hayes*,
Ir. Rep. 555.

(*b*) See *Att.-Gen. v. Parsons*,
supra.

(*c*) Plowd. 546.

(*d*) 21 Jac. 1, c. 14 (E.); 15
Car. 1, c. 1 (I.).

(*e*) *Doe d. Watt v. Morris*, 2
Bing. N. C. 189; 2 Scott, 276,
S. C.

(*f*) *Ib.*

(*g*) See *Harper v. Charles-*
worth, 4 B. & C. 574.

But an intruder upon the Crown who has not been in possession without disturbance for twenty years, or who has not acquired, under the 9 Geo. 3, c. 16, any title against the Crown, and in whose favour no presumption of a grant from the Crown can be made, having lost the possession, which has been acquired by another person, also an intruder, cannot recover by ejectment the property from such other person (*h*), or make a lease whereupon the lessee may maintain *ejectione firmæ* (*i*). And the heir or the devisee of the former intruder, never having had the possession after the death of his ancestor or testator, cannot avail himself of the possession of such ancestor or testator, and has no title to the land as against, and cannot recover it by ejectment from, such other person (*h*).

It was formerly doubted whether an intruder on the possession of the Crown can maintain trespass, even against a mere wrongdoer (*l*). It has, however, since been held that a person having the actual possession of Crown land, with the permission of, but without any legal title against the Crown, and therefore removable by the Crown without notice, may maintain trespass against a mere wrongdoer (*m*), and a licence by such a possessor of such land to a third person to take the profits of such land does not divest such possession and vest it in such third person, but it is only a privilege in him and a pernaney of the profits by the possessor (*n*).

Another effect of naked possession of land belonging to the Crown by a subject for twenty years without disturbance on the part of the Crown, is now, that, as in cases of naked possession between subject and subject,

Trespass.

What possession shifts the *onus probandi* on,

(*h*) *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

(*i*) *Harper v. Charlesworth*, 4 B. & C. 574.

(*h*) *Goodtitle d. Parker v. Baldwin*, supra; *Harper v. Charlesworth*, supra.

(*l*) See Plowd, 546, and the cases cited in *Harper v. Charlesworth*, supra.

(*m*) *Harper v. Charlesworth*, supra.

(*n*) *Harper v. Charlesworth*, supra.

the *onus probandi*, or burden of proving title, is thrown upon the Crown (*o*), and, consequently, upon its grantee (*p*).

—and does not and does give title against, the Crown.

The possession, however, although for twenty years and upwards without disturbance, is still insufficient to give to the possessor, as against the Crown, any title to the property, distinct from the possession (*q*), but, to give such title to property in *England*, must be continued for such further period as, together with the past possession, will make a period of sixty years of such possession, or during which the possessor has been in receipt of the profits of the property next before any proceeding by the Crown to recover it, without the Crown having been answered the profits of the property (*r*). The property until the passing of the statute last cited was also recoverable by the Crown when the profits had been duly in charge according to the 9 Geo. 3, c. 16 (*s*), or had stood *insuper* of record within the same period, but could not so stand unless they were before duly in charge (*t*).

Lord Ellenborough, C. J., said (*u*) the 9 Geo. 3 does not give a title; . . . it only takes away the right of suit of the Crown, or those claiming from the Crown, against such as have held an adverse possession against it for sixty years. His lordship meant, of course, a title in less than that period. For the Act is, in this respect, in the same or similar terms to 21 Jac. 1, c. 2, and of this latter act Lord Coke says (*v*) the first part of the act is negative, and exclusive of the right and

(*o*) See *Att.-Gen. v. Parsons*, 2 Mee. & W. 23.

(*p*) *Doe d. Watt v. Morris*, *supra*.

(*q*) 9 Geo. 3, c. 16; *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

(*r*) *Ib.*; 24 & 25 Vict. c. 62, s. 1; *Att.-Gen. v. Lord Hotham*, Turn. & R. 210; *Parmeter v.*

Att.-Gen., 1 Dow, 816; *Tuthill v. Rogers*, 1 Jo. & La T. 86.

(*s*) See *Att.-Gen. v. Lord Eardley*, 8 Pri. 39. Doubted by Sir E. Sugden, C., 1 Jones & La T. 82.

(*t*) 3 Inst. 189; 8 Pri. 74, 76.

(*u*) *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

(*v*) 3 Inst. 190.

title of the king, and the second part is affirmative, and establishes the state of the subject (*x*).

In relation to lands in *Ireland*, where the possession of them belonging to the Crown by a subject gives a title, as distinguished from the mere possession, the law differs from that applicable to lands in *England*. To exclude the title of the Crown to lands in *Ireland* the possessor of them must have been in the possession, or in the receipt of the profits, of them for sixty years next before any proceeding by the Crown to recover the lands, without the Crown during that period having been answered the profits thereof, or without the profits have been duly in charge according to the 48 Geo. 3, c. 47, that is, where the Crown is entitled to and in the possession of the issues and profits (*y*), which differ from the subjects of sect. 5 of that statute (*z*). After that period the possessor acquires, and the Crown loses, all title to the property so held (*a*).

As to lands in *Ireland*.

Lands in Ireland were granted by King Charles the Second to A. in tail male, reserving a rent equal in amount to the quit rent which would have been payable for them if granted in fee. The rent reserved was put in charge in the rentals of the Crown as a quit rent, and so continued until 1844. In 1776 the estate tail determined, and from thence to 1844 the persons claiming under the grantee continued in possession of the lands, claiming them in fee simple and paying the reserved rent as a quit rent. The grantee, shortly after the grant, conveyed to a purchaser in fee, but expressly saving the king's reversion. The estate was ever afterwards conveyed by fine and otherwise as a fee simple. When the estate tail determined, the seisin was vested in the Crown, and it had the right to "the possession

Tuthill v. Rogers.

(*a*) See also *Tuthill v. Rogers*, 1 Jo. & La T. 86.

(*y*) 1 Jo. & La T. 68.

(*z*) *Ib.* 67.

(*a*) 3 Inst. 189; *Att.-Gen. v. Lord Hotham*, Turn. & R. 210; *Tuthill v. Rogers*, 1 Jo. & La T. 36.

and the seisin ;” and it was held that the payment of the reserved rent was not an answering to the Crown of the rents of the lands by force of any right, title or interest to or in the lands ; that the entry of the reserved rent in the rentals of the Crown, though naming the lands out of which the rent issued, was not a putting in charge of the lands themselves, and that the Crown, although not in the “ actual seisin ” within the meaning of the 48 Geo. 3, c. 47, was barred of the title to the land ; and all these questions were determined in proceedings between subject and subject only, and in which the Crown was no party, and took no part (*b*).

Statutes as to the Crown disregard how the possession acquired.

The statutes (*c*) pay no regard to the mode in which the possession of the subject has been acquired or commenced. It may have been by tortious intrusion, without colour of title ; or it may have lawfully commenced by virtue of title from the Crown, and have been unlawfully continued after the determination of that title, as in the case of *Tuthill v. Rogers* just stated.

Position of a grantee of the Crown.

A grantee of the Crown stands in the same position and has the same right against the possessor as the Crown itself ; and, in some cases at least, although not in general (*d*), is entitled to the benefit of the prerogative maxim, *nullum tempus occurrit regi* (*e*).

Presumption of grants from the Crown.

After the statute 21 Jac. 1, c. 2, and before that of 9 Geo. 3, c. 16, grants from the Crown were (*f*), and since and independent of the latter statute have been (*g*), presumed in favour and support of long and peaceable possession. So also, after the lapse of more than sixty years without the payment of rents, the subject of the

(*b*) *Tuthill v. Rogers*, *supra*.

(*c*) 9 Geo. 3, c. 16 ; 48 Geo. 3, c. 47.

(*d*) Poph. 26.

(*e*) See *Lee v. Norris*, Cro. El. 331 ; Run. Eject. 59 ; *Doe d. Watt v. Morris*, *supra* ; *Doe v. Roberts*, 13 Me. & W. 520.

(*f*) *Powell v. Milbank*, Cowp.

103, n.

(*g*) *The Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102 ; *Roe d. Johnson v. Ireland*, 11 East, 280 ; *Gibson v. Clark*, 1 Jac. & W. 159 ; *Trotter v. Harris*, 2 You. & Jer. 285 ; *Doe d. Devine v. Wilson*, 10 Moore, P. C. C. 502.

7th sect. of the latter statute, the extinguishment of such rents has been presumed (*h*). In *Read v. Brockman* (*i*), Ashurst, J., said, "I believe it has been held, on a question respecting a right of advowson, that after a long series of presentations even a grant from the Crown may be presumed; and that is the strongest instance of a presumption, because all the grants from the Crown are matters of record. And this may have come before the Court on the pleadings, because in *quare impedit* there is no general issue. The question must be brought before the Court in some mode allowed; and if the party cannot plead a grant from the Crown without a *profert*, and the grant is lost, his title would be also lost; therefore *ex necessitate* he must plead it as a non-existing grant, and that it is lost by time." In *Doe d. Devine v. Wilson* (*j*), the court said from the long possession of the lands in that case in *New South Wales* for thirty years, the jury would have been justified in presuming, not a substitutional, but a supplementary and confirmatory, grant by the Crown, and that it was competent to the Crown to make such a confirmatory grant. But in all these cases of presumed grants, the grants could have been legally made by the Crown, and then a court will direct a jury to presume in favour of possession any such grant (*h*), and in all the cases here cited the question was, not between the Crown and a subject, but between subject and subject only, and then the presumption seems to have been properly made in support of such a possession. But it does not follow that, in a case between the Crown and a subject, the presumption would have been made, or at least so readily made, as in cases between subject and subject. In *Parmeter v. Att.-Gen.* (*l*), lands were claimed under

Presumption
for the Crown

(*h*) *Simpson v. Gutteridge*, 1 Mad. 609. See also *Tuthill v. Rogers*, *supra*.

(*i*) 3 T. R. 151.

(*j*) 10 Moore, P. C. C. 502.

(*k*) See *Goodtitle d. Parker v. Baldwin*, 11 East, 488; *Doe d. Devine v. Wilson*, *supra*.

(*l*) 1 Dow, 316.

against its own grant. a grant from the Crown, but the only mode of making a title to them as against the Crown appearing to be by showing a sufficient possession, which was not shown, and the Crown, notwithstanding such grant, having remained in possession of them for upwards of 150 years after the grant, that possession was held to create a presumption in favour of the title of the Crown against even such grant, and against the appellant, whose possession had been for only nineteen or twenty years.

Grant not presumed where alienation restrained.

Where, however, the possession is for a period less than sixty years (*m*), and *à fortiori* where in addition to the shorter period the Crown is restrained from alienating the property in question (*n*), the presumption of a grant by the Crown cannot be made. The 9 Geo. 3, c. 16, has not the effect of repealing the statute imposing upon the Crown restraints against alienation (*o*).

Length of time to raise presumption of grant against the Crown.

It is said, however, that in order to raise the presumption of a grant against the Crown a longer time is required than against a private individual (*p*). But the authorities cited in support of this proposition were all cases between subject and subject only, involving indeed the question of presuming a grant by or from the Crown in support of possession, but not against the Crown in an issue between the Crown and a subject, and none of them involving the question as to the greater or less degree of time requisite in the one case than in the other. The cases of *Trotter v. Harris* (*q*) and *Doe d. Devine v. Wilson* (*r*) also are the other way.

Prerogatives of the Crown extend to the duchies of Lancaster and Cornwall.

The Crown has the same prerogative in relation to the possessions of the duchy of *Lancaster* as in relation to those *jure coronæ* (*s*), and therefore is not by usurpation put out of possession of an *advowson* held in right

(*m*) See *Goodtitle d. Parker v. Baldwin*, 11 East, 488; *Mill v. The Commissioners of the New Forest*, 18 C. B. 60.

(*n*) *Ib.*; see also *Doe d. Devine v. Wilson*, *supra*.

(*o*) See *Goodtitle d. Parker v.*

Baldwin, *supra*.

(*p*) Best on Ev. s. 381.

(*q*) 2 You. & Jer. 285.

(*r*) 10 Moore, P. C. C. 502.

(*s*) *Reg. v. Archbishop of York and another*, Cro. El. 240.

of the duchy (*t*). So also in relation to the possessions of the duchy of *Cornwall* when there is no Duke of Cornwall (*u*).

In relation to things incorporeal, however, some, by the enjoyment or *quasi* possession thereof, may be acquired at common law even against the Crown, and are not within the maxim *nullum tempus occurrit regi* (*v*). At the common law, if any had usurped upon the king, and the presentee had been admitted, instituted and inducted (for without induction the church had not been full against the king), the king might have removed him by *quare impedit*, and been restored to his presentation: for therein he hath a prerogative, *quod nullum tempus occurrit regi*; but he could not present, for the plenartie barred him of that; neither could he remove him any way but by action, to the end the church might be the more quiet in the meantime (*x*). In other instances also the Crown loses its right either because before it is exercised the subject of it fails, or because the right is not exercised in due time (*y*), or cannot exercise the right until it has been first recovered, as in the case of presentation to a church already full against the Crown (*z*). For the maxim just quoted applies only when the king has an estate or interest certain and permanent and not when his interest is specially limited, when and how he shall take it, and not otherwise; for there time is the substance of his title, and *tempus occurrit regi* (*a*). Some writers, indeed, have said that no claim by prescription can be made against the Crown (*b*). But it is submitted that the

Some things incorporeal not protected by the maxim *nullum tempus*.

(*t*) *Reg. v. Archbishop of York*, 358.
ſc., *infra*.

(*u*) See *Att.-Gen. v. St. Aubyn*, Wightw. 167.

(*v*) Co. Litt. 114 b; Plowd. 322; Staundf. Prærog. Reg. c. 8.

(*w*) Co. Litt. 344 b.

(*y*) Staundf. Prærog. Reg. 32 b; *Baskerville's case*, 7 Co. 28 a.

(*z*) Co. Litt. 344 b; 2 Inst.

L.

358.

(*a*) 7 Co. 28 a; Staundf. Prærog. Reg. c. 8.

(*b*) See Best on Ev. ss. 370, 383. Since this was written the 4th edition of this work has appeared, and contains a reference to the authorities on both sides of the question.

authorities cited in support of this proposition do not support it. Comyn indeed in his Digest, in showing what things may be claimed by prescription, includes such as can be derived from the Crown only, and Lord Coke distinctly states that such things may be acquired by prescription (*c*); and against this authority that of Rolle (*d*) cannot be sustained. The enjoyment or *quasi* possession, as against the Crown by any person, of rights of common or other profits or benefits, ways or other easements, watercourses, and the use of water, upon, over or from any land or water of the sovereign or parcel of the duchy of Lancaster (*e*), and also of prescriptions and claims of or for any *modus decimandi*, or of or to any exception from a discharge of tithes by composition real or otherwise as against the Crown (*f*), is secured to the subject after the expiration of certain times.

Defendant in intrusion in the nature of trespass for an injury to an incorporeal right need not plead title to the land used.

Although in an information of intrusion the defendant, when his possession of lands has been for less than twenty years, must maintain, and show it to be legal (*g*), yet in an information in the nature of an action of trespass on the case for an injury to the incorporeal right of forest by interfering with the game, the defendant is not bound to plead title to the land which he uses in such a way as to be injurious to the game (*h*).

Liberties and franchises.

Liberties or franchises also are expressly excepted from the 9 Geo. 3, c. 16 (E.), and the 48 Geo. 3, c. 47 (I.). Therefore, although as to this species of Crown property proof of their existence, user and enjoyment may be sufficient to enable one subject having the bare *quasi* possession of them to maintain against a mere wrongdoer an action of trespass (*i*), yet as between the

(*c*) Co. Litt. 114 b.

(*d*) 2 Ab. 264, Prescription C.

(*e*) 2 & 3 Will. 4, c. 71.

(*f*) 2 & 3 Will. 4, c. 100.

(*g*) Supra.

(*h*) *Att.-Gen. v. Hallett*, 1 Exch. 211.

(*i*) *Trotter v. Harris*, 2 You. & Jer. 285.

Crown and a subject they are still within the common law and the maxim *nullum tempus occurrit regi*.

In relation to the possession of property of the Duke of Cornwall no express legislative provision similar to that in relation to the possession of, as distinguished from the title to, the property of the sovereign, exists (*j*). But the possession of property, parcel of the possessions of the duchy of *Cornwall*, is conceived to be within the 21 Jac. 1, c. 14, as between the Duke of Cornwall and another subject, in like manner as in a case between the Crown and a subject (*k*). A title, as distinguished from mere possession, may with some exceptions, be acquired against the Duke by another subject in the same manner as in the possessions of the Crown against the Crown itself (*l*); and it is conceived that as until these statutes in relation to the property of the Duke, parcel of the duchy, that property was in the same position as the property of the Crown, and as those statutes contain exceptions of certain property belonging to the duchy, the Duke, in relation to the property so excepted, as in the case of the Crown, is still entitled to the benefit of the maxim *nullum tempus occurrit regi* (*m*).

The Duke of Cornwall's corporeal possessions.

The enjoyment or *quasi* possession of the incorporeal rights secured to the subject as against the Crown (*n*) is also secured to the subject as against the Duke of Cornwall by the same statutes.

Incorporeal rights against him.

(*j*) 21 Jac. 1, c. 14.

(*k*) See *Att.-Gen. v. St. Aubyn*, Wightw. 167.

(*l*) See 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; 24 & 25 Vict.

c. 62.

(*m*) See *Att.-Gen. v. St. Aubyn*, *supra*.

(*n*) *Supra*, pp. 40, 41, 97.

CHAPTER V.

POSSESSION PROPER AND QUASI POSSESSION AS
BETWEEN SUBJECT AND SUBJECT.

How possession regarded here. POSSESSION, both proper and *quasi*, is regarded here, as to its nature, as a mere condition of fact (*a*), independent of the title to, or of the property in, the thing possessed, and whether acquired wrongfully or acquired rightfully, but continued wrongfully.

In whom presumed to be. The possession is presumed to be in the owner of the soil and freehold until some evidence is given to the contrary. If, therefore, land over which a right of way is claimed by a lessee be not shown to be comprised in the demise, the presumption is that such land was not demised, that he has an easement only, and that the possession of the land is in the lessor as such owner (*b*).

Making entry. When a person entitled to, enters in the assertion of, the possession, or, which is exactly the same thing, any other person enters by command of the person so entitled, the law immediately vests the actual possession in the person who has so entered (*c*); and any person who insists on remaining on the land of another against his will, and, therefore, *primâ facie* against right, ought to show all the circumstances which make such possession lawful, and abridge the general rights of property (*d*).

When two persons on the land. If two persons be upon land, each asserting that it is his, and each doing some act in virtue of his alleged ownership, the person who has the title is in actual possession (*e*), and the other person is a trespasser. They

(*a*) Chap. II. of this Book.

821.

(*b*) *Herbert v. Thomas*, 1 C.,
M. & R. 861.

(*d*) 8 Ex. 545.

(*c*) See 7 B. & C. 402; 2 Ex.

(*e*) Litt. s. 701; Plowd. 233.

differ in no other respects. They have not a *joint* possession, nor a possession as tenants in common, for a man cannot be a tenant in common by wrong (*f*); but one is in possession, and the other is a trespasser, and which of the two really is in possession is determined by the fact of the possession following the title; that is, by the law, which makes it follow the title (*g*).

Where a lessee is in the actual possession under his lease, his possession will be presumed to continue until the determination of his interest, not doing any act to the contrary. But after his interest has ceased he will not be presumed to have continued his possession unless an intention to the contrary be clearly shown, because by such continuance he would be a wrongdoer (*h*). By lessee.

The possession of the lands of the church by ecclesiastical persons is in such persons in right of their respective churches or other ecclesiastical preferment, and they are said to be seised in fee in that right (*i*). But whether the incumbent of a perpetual curacy, augmented by Queen's Anne's Bounty, be seised in fee simple, or even in right of his church, has been the subject of considerable doubt and difference of opinion (*j*). By ecclesiastical persons.

Possession is evidence against a rector or vicar who has submitted to it, but is not, in general, evidence against his successor who has not submitted to it (*k*). A lease by a perpetual curate, not confirmed by the patron of the rectory (*l*), or by the bishop (*m*), is therefore void; and the acceptance by the successor of the rent reserved by such lease is no affirmance by him of such Against whom evidence.

(*f*) Plowd. 223; Salk. 423.

(*g*) 1 Inst. 368 a; 2 Ex. 821.

(*h*) *Brown v. Notley*, 3 Ex. 219.

(*i*) Co. Litt. 44 a, 66 b; Litt. ss. 643, 644, 645.

(*j*) See *Doe d. Richardson v. Thomas*, 9 Ad. & E. 556.

(*k*) See Co. Litt. 45 a; Litt.

ss. 643, 644, 645; *Croft v. Howel*, Plowd. 538, and n. in *Stowel v. Lord Zouch*, Ib. 875; 5 B. & C. 700; *Barker v. Richardson*, 4 B. & Ald. 579.

(*l*) *Doe d. Brammall v. Collinge*, 7 C. B. 939.

(*m*) *Doe d. Richardson v. Thomas*, 9 Ad. & E. 556.

lease. But the payment by the lessee under such a lease, and the acceptance by the successor of the lessor, of the rent reserved by the lease, is evidence against such successor of a demise by him from year to year(*n*), as well as in the case of a natural person(*o*).

Possession of benefices, what is and what is not.

By institution the church is full against all persons except the king(*p*), and is sufficient to enable the presentee to maintain the possessory action of *quare impedit*(*q*). But although he who has the right to the advowson was, before the 7 Anne, c. 18, put out of possession by admission and institution upon an usurpation by presentation but not by collation(*r*), and *à fortiori*, if induction thereon followed(*s*), yet induction alone gives to the presentee the temporal and corporeal possession of the church with the rights thereto belonging(*t*), puts him into the actual possession of a part for the whole without the necessity of his actually going upon the glebe itself(*u*), and enables him to maintain both trespass(*x*) and ejectment(*y*). In donatives the appointment alone is induction, and therefore possession(*z*); but in curacies, the curate is not in possession until licensed(*a*).

Against rightful owner gives title.

If possession be acquired wrongfully against the rightful owner, who is under no personal disability or incapacity recognized by law as relieving him, during the existence of such disability, from the consequences of not asserting his right(*b*), or if the possession be acquired rightfully, and the right to it so acquired after-

(*n*) *Doe d. Pennington v. Tanriere*, 12 Q. B., N. S. 998; *Doe d. Brammall v. Collinge*, *supra*.

(*o*) *Doe d. Pennington v. Tanriere*, *supra*.

(*p*) 4 Co. 79 a; Co. Litt. 343 b.

(*q*) Plowd. 528; Co. Litt. 344 a, b; 4 Co. 79 a.

(*r*) Co. Litt. 344 b; 6 Rep. 49 a, 50 a, 29 b.

(*s*) Plowd. 529.

(*t*) *Ib.* 528; *Harscot's case*, Comb. 202; *Doe d. Watson v. Fletcher*, 8 B. & C. 25.

(*u*) Per Abbott, C. J., *Bulwer v. Bulwer*, 2 B. & Ald. 470.

(*x*) Plowd. 528; 2 B. & Ald. 470.

(*y*) *Doe d. Watson v. Fletcher*, *supra*.

(*z*) 3 Wils. 365.

(*a*) 1 T. R. 401.

(*b*) *Doe d. Pennington v. Barrell*, 18 L. J., N. S., Q. B. 51.

wards determine, but the possession be continued from that determination for twenty years against such owner (*c*), such possession confers on the possessor, as against such owner, a title to the land; but the law merely negatives the title of such owner as against the actual possessor, and does not affirm, but leaves open, the title of such possessor as against all other persons.

But to constitute a title against such owner the possession must be continuous for the requisite period, by or through the original possessor (*d*), and not merely for a series of distinct periods of time, but each less—together greater—than such period, by different persons successively independent of each other, and not claiming by or through such possessor or each other (*e*). So, also, to constitute a title against such possessor (*f*).

But must be continuous.

But possession may be acquired under circumstances which, as between the possessor of, and those persons who, subject to his possession, have the property in, the land, will deprive the possession of any efficacy to confer on him, apart from his possession, any title to the land itself against them, beyond that which gives him the right to the possession of it. Whenever a person comes to the possession, either by judgment of law, or by his own agreement, and holds that possession, he, and all who claim under him, must hold it according to his right to the possession, and cannot qualify it by any other right (*g*).

May be so acquired as to confer no title beyond mere possession; as,

There may be a possession not accompanied by the freehold, such as chattel interests of various kinds created either by compact of the parties or by judgment of

—by contract, or judgment of law;

(*c*) *Keyse v. Powell*, 2 Ell. & B. 132.

(*d*) *Asher and Uz. v. Whitlocke*, L. R., 2 Q. B. 1; 35 L. J., N. S., Q. B. 17; 11 Jur., N. S. 925; 13 T. R., N. S. 254; 14 W. R. 26, S. C.

(*e*) See *Doe d. Evans v. Page*, 5 Q. B. 767; *Doe d. Carter v. Barnard*, 13 Ib. 945; *Dixon v. Gayfer*, No. 2, 17 Beav. 433.

(*f*) *Ib.*; *Asher and Uz. v. Whitlocke*, *supra*.

(*g*) 2 Sch. & Lef. 98.

law, as in the case of an elegit creditor. These tenants have not the freehold in them, nor can a warrant which is to deal with the right to the lands be brought against them; they can by no possibility lawfully meddle with that right, they are disabled by the imbecility of their estates. The possession of the person holding under such title is the possession of the parties who have the freehold, and he cannot be allowed to deal with the possession so as to deprive the person entitled to the freehold of his right. . . . Therefore, whoever gets such possession, and whoever takes by assignment from him, never can set up such possession against the person having the freehold out of which such chattel interest was created (*h*).

Persons coming into possession therefore by contract, as in case of landlord and tenant (*i*), must hold according to the right acquired by such persons and cannot qualify that right by any other right; and whilst any contract express or implied subsists between the persons in and the persons out of possession, the possession, in general, cannot be adverse (*k*). When possession is gained under a contract by even a person having a right, he can only have the possession such as the person has it from whom he obtains it, and is bound to accept it according to that right; and if that other person has but a chattel interest under a disseisor, the person entering can have no more than a chattel interest; and that, because according to the expression in the books, it was his folly to take possession in such manner, instead of recovering it by lawful means (*l*); and if the person having the mere right obtain posses-

(*h*) 2 Sch. & Lef. 98; Cowp. 689.

(*i*) *Saunders v. Lord Annesley*, 2 Sch. & Lef. 73; *Att.-Gen. v. Lord Hotham*, 1 Turn. & R. 210; *Archbold v. Scully*, 9 H. L.

C. 360; *Beere v. Fleming*, 11 L. T. R., N. S. 49.

(*k*) *Doe d. Colclough v. Hulso*, 3 B. & C. 757.

(*l*) 2 Sch. & Lef. 103.

sion by contract or agreement with the person in possession, he never can be remitted to his mere right, but must hold the possession accordingly (*o*).

The same principle applies where persons acquire possession under a will (*p*), even when it is inoperative to pass the property (*q*), or claiming less than the entire estate (*r*), or stating in instruments the character and title under which they have and have had possession (*s*); and where the circumstances are such that the law does not acknowledge the right of remitter (*t*), and also all those who claim under such persons (*u*). So, any person claiming under an instrument which shows the claim to be under another person, makes, by such instrument, a direct acknowledgment of the title of such other person (*x*).

—or under an instrument, independent of contract.

The possession of a tenant for years or at will (*y*) is the possession of the lessor and of his heir, even before entry or receipt of rent (*z*); and the seisin or possession, in fact (*a*), of such lessor and heir, but only of the freehold, for the actual possession is in the tenant (*b*). But the possession of a lessee for life is not the possession of the heir of the lessor without receipt of rent (*c*).

When possession of tenant possession of landlord, and not.

The mere nonpayment, or the payment to a stranger, of the rent reserved by a lease, either during a part (*d*),

Effect of non-payment, or payment to a

(*o*) 2 Sch. & Lef. 98.

(*p*) *Asher v. Whitlocke*, L. R., 2 Q. B. 1.

(*q*) *Kernoghan v. M'Nally*, 12 Ir. Eq. Rep. 39; *Scott v. Scott*, 4 H. L. C. 1065. In the last case, also reported 18 Jur. 755, 23 L. T. R. 27, the words "against the tenant for life," 4 H. L. C. 1083, are not in the other reports, and appear not to be warranted by the context, and probably were not used by the distinguished judge to whom they are attributed.

(*r*) Litt. s. 695; 5 Curt. Amer. Rep. 224.

(*s*) 1 Swanst. 359; Jac. 505.

(*t*) 2 Sch. & L. 109.

(*u*) Ib. 97, 98; *Hawksbee v. Hawksbee*, 11 Hare, 230.

(*x*) *Lewis v. Thomas*, 8 Hare, 26.

(*y*) *Doe d. Warren v. Fearnside*, 1 Wils. 176.

(*z*) 1 Inst. 157; Gilb. Ten. 158; *Goodtitle v. Newman*, 8 Wils. 516; 1 Jo. & La T. 76; *Bushby v. Dixon*, 8 B. & C. 299; Co. Litt. 15 a.

(*a*) Co. Litt. 243, a.

(*b*) Plowd. 162; Co. Litt. 263 a; *Berry v. White*, Bridg. 93, 495.

(*c*) Co. Litt. 15 a; *Doe d. Barnett v. Keen*, 7 T. R. 886.

(*d*) *Doe d. Cook v. Danvers*, 7 East, 319.

stranger, of
rent, before
3 & 4 Will. 4,
c. 27.

or even during the whole of the term (*f*), did not before the 3 & 4 Will. 4, c. 27, as respects the possession of the demised premises, affect the relation between the lessor and the lessee.

Since, in cases
between land-
lord and ten-
nant;

Important alterations, however, as between landlord and tenant have been made by the legislature, and now, in some cases, a tenant may acquire a title, against his landlord, and in one case a third person may acquire a title to property comprised in a lease, notwithstanding the lease, and exclude wholly or partially during its continuance the title of the lessor to the reversion on the expiration of the lease.

—tenancy at
will;

In the case of a tenancy at will, the tenancy, as between the parties to it, is determined at the end of one year after the commencement, and the right of the landlord to the possession accrues, and time commences displacing his title from that period, and giving to the tenant continuing in possession for twenty years after such determination a title against his landlord (*g*).

—from year to
year;

In the case of a tenancy from year to year or other period without any lease in writing, the tenancy, as between the parties to it, is determined at the expiration of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy has been received, which may last happen, and the right of the landlord to the possession accrues, and time commences displacing his title from that period, and giving to the tenant continuing in possession for twenty years after such determination a title against his landlord (*h*).

(*f*) *Saunders v. Lord Annesley*, 2 Sch. & Lef. 106, 633.

(*g*) See 3 & 4 Will. 4, c. 27, ss. 2, 7; *Doe d. Thompson v. Thompson*, 6 Ad. & E. 721; *Doe d. Bennett v. Turner*, 7 Mee. & W. 226; 9 Ib. 643; *Doe d. Stanway v. Rock*, 4 Man. & G. 30; *Doe d. Robinson v. Hinde*, 2 Moo. & Rob. 441; *Doe d. Evans*

v. Page, 5 Q. B. 767; *Doe d. Dayman v. Moore*, 15 L. J., Q. B. 324; *Doe d. Groves v. Groves*, 16 Ib., Q. B. 297; *Randall v. Stevens*, 23 Ib., Q. B. 37; *Doe d. Goody v. Carter*, 18 Ib., Q. B. 305; *Doe v. Cox*, 11 Q. B. 123; *Doe v. Bold*, Ib. 127; 9 H. L. C. 375, 386.

(*h*) See 3 & 4 Will. 4, c. 27,

In the case of a tenancy under a lease in writing, —under a lease in writing.
reserving a rent yearly of 20*l.* and upwards, the receipt of the rent reserved by such lease by a person wrongfully claiming the demised property in reversion immediately expectant on the determination of the lease, and no payment in respect of such rent afterwards made to the person rightfully entitled to the property subject to the lease, the right of the landlord to the property so subject accrues, and time commences displacing his title from the period when the rent reserved by the lease is first received by the person so wrongfully claiming, and not upon the determination of the lease, and giving to such person continuing such receipt for twenty years a title against the person so rightfully entitled (*i*). In the last case attornment merely, however, will not operate such a bar or determination (*k*).

As before these alterations, so since in the last case the mere nonpayment by the lessee to the lessor of the rent reserved by the lease does not affect his title to the reversion on the determination of the lease (*l*), and so long as the relation of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by nonpayment for however long a time. The right to the rent is an incident to the reversion. That statute does not apply, except indeed that by the 42nd section it prevents the recovery of arrears for more than six years; and the same principle must govern the case of a demand in equity. The 24th section only bars equit-

Effect of mere non-payment of rent between lessor and lessee.

ss. 2, 8; *Doe d. Earl Spencer v. Beckett*, 4 Q. B. 601; *Doe d. Jukes v. Sumner*, 14 Mee. & W. 39; *Doe d. Edney v. Benham*, 14 Q. B. 342; *Doe d. Edney v. Bilet*, 1*b.* 343; *Doe d. Landell v. Grover*, 21 L. J., N. S., Q. B. 56; *Ley v. Peter*, 3 Ex. 101; 9 H. L. C. 375, 386.

(*i*) See 3 & 4 Will. 4, c. 27, ss. 2, 9; *Nepean v. Doe d. Knight*, 2 Mee. & W. 894; *Doe d. Davy v. Oxenham*, 7 *Ib.* 131; *Doe d.*

Angell v. Angell, 15 L. J., Q. B. 193; *De Beauvoir v. Owen*, 5 Ex. 176; *Grant v. Ellis*, 9 Mee. & W. 126—7.

(*k*) 9 H. L. C. 381.

(*l*) See *Chadwick v. Broadwood*, 3 Beav. 180; *Doe d. Davy v. Oxenham*, 7 Mee. & W. 131; *Doe d. Newman v. Goddill*, 5 Jur. 170; 4 Q. B., N. S. 603, n.; *Grant v. Ellis*, 9 Mee. & W. 118; *Re Turner's Estate*, 11 Ir. Eq. Rep. 304; *Archbold v. Scully*, *supra*.

able rights so far as they would have been barred if they had been legal rights (*m*).

Possession by one of two lessees;

The possession by one of two lessees is possession by both, and if one of them be in possession as tenant from year to year, the lease is an enlargement of the estate of such one for the term created by the lease, and the possession enures for the benefit of both, and the interest passing by the lease cannot be considered a mere *interesse termini* (*n*).

In the case of a contract for the sale and purchase of lands, when the vendee is let into possession, and continues to pay interest for several years to the vendor, he is not a trespasser till he has refused to quit after demand, and until that demand he is considered as having the possession with the permission of, and therefore not adversely to, the vendor (*o*), and the purchaser cannot say that the vendor has no title (*p*).

—by vendee;

In those cases where the contract merely provides for payment of interest on the purchase-money, independent of, and not by way of compensation for, the occupation, a mere tenancy at will is created between the parties (*q*), not by the agreement, but by the possession. If the purchaser be already in possession as tenant from year to year, the intention of the parties, whether a new tenancy at will is created or not, and from what time, must be collected from the agreement (*r*). Such tenancy at will, however, is not within sect. 7 of the 3 & 4 Will. 4, c. 27 (*s*), and therefore the vendor

(*m*) 9 H. L. C. 375, 386.

(*n*) *Keyse v. Powell*, 2 Ell. & B. 182.

(*o*) *Doe d. Milburn v. Edgar*, 2 Bing. N. C. 498; *Doe d. Stanway v. Rock*, 4 Man. & G. 30; *Toft v. Stephenson*, 7 Hare, 1; *S. C.* on appeal, 1 De Gex, M. & G. 28.

(*p*) *Doe d. Milburn v. Edgar*, *supra*.

(*q*) *Right d. Lewis v. Beard*,

18 East, 210; *Doe d. Newby v. Jackson*, 1 B. & C. 448; *Doe d. Tores v. Chamberlaine*, 5 Mees. & W. 14; *Doe d. Goody v. Carter*, 11 Jur. 285; 9 Q. B. 863; *Doe d. Gray v. Stainon*, 1 M. & W. 695.

(*r*) *Doe d. Gray v. Stainon*, *supra*.

(*s*) *Doe d. Stanway v. Rock*, *supra*; 6 Jur. 266.

cannot eject the purchaser without a demand of possession, for an ejectment treats the tenant in possession as a wrongdoer at the time when the action is brought. If he be lawfully in possession, then it is an answer to the action, whatever may be the date of the demise laid in the declaration, for an ejectment is altogether a fictitious remedy. If, therefore, there be a tenancy it must be determined before ejectment can be sustained (*t*). But the contract, if it provide for the payment of the interest in such a mode as, in effect, to constitute a letting at a yearly rent, as making the interest payable half-yearly (*u*), constitutes a tenancy from year to year (*v*).

In the case of an agreement for a lease, and possession taken under such agreement by the intended lessee, a tenancy at will is created (*x*). —by intended lessee under agreement for lease;

The possession may be either by a person or persons entitled to it jointly with some other person or persons, or by the permission of a person who, in a court of law, as between himself and the possessor or possessors, is entitled to the possession; but such a relation exists between the possessor or possessors, and such other person or persons, and the person permitting it respectively, as in general deprives the possession of the effect it would have upon the title of the person so entitled to or permitting that possession if no such relation existed. Thus the possession of a younger brother (*y*) or other relation of the heir, or of one of several coparceners (*z*), joint tenants (*a*), or tenants in common (*b*), against such heir, or against the other or others of such joint owners, did not alone at common law vary the nature of such possession, because the —by a person or persons entitled jointly with others;

- (*t*) *Doe d. Newby v. Jackson*, 17 Q. B. 389.
 1 B. & C. 448. (*y*) Litt. s. 396; Gilb. Ten. 28.
 (*u*) 5 Mee. & W. 16. (*z*) 1 Inst. 243 b., 373 b.
 (*v*) *Saunders v. Musgrave*, (*a*) 1 Salk. 392; 2 Ib. 423.
Bart., 6 B. & C. 524. (*b*) 1 Inst. 199 b; Cro. El. 641;
 (*x*) *Doe d. Landsell v. Gower*, 2 Salk. 422.

possession of such relation, or of such one of those joint owners, being that of the heir or of the other or others, the latter would, in contemplation of law, be deemed to be also in possession. But the 3 & 4 Will. 4, c. 27, has destroyed this common law right, and, at least as far as relates to the object of the act, has the effect of making the possession of persons in these relations separate from the time when the relations were first created (c). At common law, however, the mere possession by a sister is not the possession of, but adverse to her brother (d). There is also the *possessio fratris*, enabling a sister to inherit the fee simple property of her brother, under the rule, *possessio fratris de feodo simplici facit sororem esse hæredem* (e). The possession within this rule must be actual, and the rule extends to the issue of the sister (f), but does not apply to dignities in fee (f).

—by a mortgagor;

The possession by a mortgagor is considered as by the permission of the mortgagee (g), and is not, at any assignable period, unless a jury from renunciation by the mortgagor, or some other circumstances, are induced to find that the possession was opposed to, or inconsistent with, the right to it of the mortgagee (h), but is the possession of the mortgagee (i).

—by *cestui que trust*.

In general, the possession by a *cestui que trust*, when consistent with the terms of the trust, is not opposed to or inconsistent with the title of the trustee (k), and when consistent with the title under which it has been acquired, and by which it is guarded, is not to be used to

(c) 11 Ad. & E. 1016; *Lessee O'Sullivan v. M'Swiny*, Longf. and Town. Ir. Rep. 111; *Doe d. Holt v. Horrocks*, 1 Car. & K. 566; 1 Jones & La T. 303.

(d) *Doe d. Draper v. Lawley*, 13 Q. B. 954.

(e) Litt. ss. 7, 8; Co. Com. 14 a, 15 a, b.

(f) Co. Litt. 15 b.

(g) *Hall v. Doe d. Surtees*, 5 B. & Ald. 687; *Doe d. Jones v. Williams*, 5 Ad. & E. 291.

(h) *Doe d. Jones v. Williams*, *supra*.

(i) *Loman v. Newnham*, 1 Ves. sen. 51; 2 Cox, 123; 2 Mer. 360.

(k) *Smith d. Dennison v. King*, 16 East, 283; 3 B. & C. 404.

subvert the title to which it is subject, nor to defeat the trusts which are expressly declared to be a part of this title (*l*). The legal interest is in the trustee: actions must be brought by him; the *cestui que trust* has no interest in law; if he enter, his possession is considered the possession of the trustee, the *cestui que trust* only possessing the property in the right of the trustee (*m*), and under the protection of the instrument by which the estate is conveyed to the trustee (*n*). The legal title to the possession, if it conflict with the equitable, must prevail, and in a court of law may be set up, even by the trustee against the *cestui que trust* (*o*); and the possession of the latter is neither a bar to, nor an extinguishment of, the title of the trustee so as to let in the claim of the widow of the *cestui que trust* to dower (*p*).

In *Knight v. Bowyer* (*q*), Turner, L. J., said, "Assuming that there was no possession by the trustee there was the receipt of the rents by a receiver clothed with a trust, and the estate vested in the trustee could not be barred or extinguished whilst some of his *cestuis que trust* were in receipt of the whole produce of the estate, and were in such receipt under a deed forming part of the same security." As long as the relation of trustee and *cestui que trust* exists, the possession of the *cestui que trust* is not only the possession of the trustee (*r*), but gives to the trustee a seisin in deed and the actual possession on the death of the *cestui que trust* (*s*).

At law, a *cestui que trust*, when in possession of the

His position at law as to his trustee;

(*l*) 9 Ir. Eq. Rep., N. S. 137; *Price v. Blakemore*, 6 Beav. 507.

(*m*) 7 Bing. 599.

(*n*) 8 C. B. 252.

(*o*) 8 Q. B., N. S. 449.

(*p*) *Garrard v. Tuck*, 8 C. B. 231.

(*q*) 2 De Gex & J. 440.

(*r*) *Faussett v. Carpenter*,

supra; 7 Bing. 599; 4 Hare, 417; *Garrard v. Tuck*, 8 C. B. 231; *Melling v. Leak*, 16 Ib. 652; *Knight v. Bowyer*, 23 Beav. 609; *S. C.* on appeal, 2 De Gex & J. 421; *Price v. Blakemore*, 6 Beav. 507.

(*s*) 4 Hare, 417.

trust estate, either with the consent or the mere acquiescence of the trustee, is tenant at will (*q*), or *quasi* tenant at will (*r*) to him; and the assignee of the *cestui que trust* is in exactly the same position to the trustee as the *cestui que trust* himself (*s*).

—in equity.

In equity, however, the right of the *cestui que trust* to the possession is not merely recognized, but, in general, he cannot be deprived of it by the trustee (*t*); and where the nature or the purposes of the trust do not require that the trustee should have the actual possession of the lands (*u*), the possession will be either given or restored to the *cestui que trust*, who is exclusively interested (*x*), even where a *feme covert* and entitled for her separate use during her life only (*y*). Where, however, a *cestui que trust* is not exclusively interested, the possession by him is in the discretion of the court (*z*), and a *cestui que trust* will not be disturbed in the possession (*a*), unless he has, in relation to the management of the estate, misconducted himself (*b*). If he be in possession under a trust permitting him to receive the rents, his position is different to that under a trust permitting him to continue the possession (*c*); and the possession of one of several *cestuis que trust* is the possession of the other or others (*d*).

(*q*) *Freeman v. Barnes*, 1 Vent. 80; 1 Sid. 349, 458.

(*r*) *Garrard v. Tuck*, 8 C. B. 231; *Melling v. Leak*, 16 C. B. 652.

(*s*) *Faussett v. Carpenter*, 2 Dow & C. 232.

(*t*) 2 Mer. 359.

(*u*) See *Blake v. Bunbury*, 1 Ves. jun. 194, 514; 4 B. C. C. 21; *Jenkins v. Milford*, 1 Jac. & W. 629; *Baylies v. Baylies*, 1 Coll. 537; *Denton v. Denton*, 7 Beav. 388; *Pugh v. Vaughan*, 12 Ib. 517; *Horner v. Wheelwright*, 2 Jur., N. S. 367.

(*x*) *Brown v. How*, Barn. 154;

Att.-Gen. v. Lord Gore, Ib. 150.

(*y*) *Horner v. Wheelwright*, 2 Jur., N. S. 367.

(*z*) *Blake v. Bunbury*, 1 Ves. jun. 194, 514; *Tidd v. Lister*, 5 Mad. 429; *Jenkins v. Milford*, 1 Jac. & W. 629.

(*a*) *Baylies v. Baylies*, 1 Coll. 537; *Denton v. Denton*, 7 Beav. 388.

(*b*) *Pugh v. Vaughan*, 12 Beav. 517.

(*c*) 1 Jac. & W. 633.

(*d*) Vin. Ab. Voc. Possession (C) 8; *Knight v. Bowyer*, 2 De Gex & J. 421.

If the *cestui que trust* be not in possession but be merely allowed to receive the rents of, or otherwise to deal with, the trust property in the possession of others as tenants, he is merely an agent or bailiff of the trustee (*h*); but no tenancy at will is created between such tenants and the trustee (*i*).

The entry (*h*) or the claim (*l*) of or by the *cestui que trust* is an entry or claim of or by the trustee, and every disposition by the *cestui que trust* of his beneficial interest is, in equity, binding upon the trustee (*m*), and even at law any disposition made by the *cestui que trust* and adopted by the trustee is considered as the disposition, and any other act by the *cestui que trust*, known to and not repudiated by the trustee is considered as the act, of the trustee (*n*).

Effect of entry or claim by *cestui que trust*.

Lord Hardwicke seems to have thought (*o*) that a disseisin or actual ouster of the trustee by the *cestui que trust* may be presumed from length of possession, or under particular circumstances, and is reported to have said that a *cestui que trust* may disseise his trustee and gain the legal estate. If, said his lordship, for a long period there be no possession in the trustee, and the *cestui que trust* alone continue in possession and exercise acts of ownership, that may be strong evidence to induce a court of law to believe that he had disseised the trustee (*p*). The *cestui que trust* may have a substantive independent possession (*q*). But although, said Lord Wynford (*r*), there may be cases where the pos-

Whether he can disseise his trustee.

(*h*) *Melling v. Leak*, 16 C. B. 652. See also *Jenkins v. Milford*, 1 Jac. & W. 629; *Doe d. Jukes v. Sumner*, 14 M. & W. 39.

(*i*) *Melling v. Leak*, supra.

(*k*) See *Gree v. Rolle*, 1 Lord Raym. 716.

(*l*) 8 C. B. 236.

(*m*) *Packer v. Wyndham*, Pro. Ch. 412; Gilb. Eq. Rep. 98, S. C.;

Ex parte Chysegame, 1 Atk. 191.

(*n*) 7 Bing. 579.

(*o*) *Lord Portsmouth v. Lord Effingham*, 1 Ves. 482, 485, 486.

(*p*) See also *Harmood v. Oglander*, 6 Ves. 199; 8 Ib. 106; 2 Mer. 360.

(*q*) Per Sir W. Grant, M. R., 2 Mer. 860.

(*r*) 2 Dow & C. 232.

session of the *cestui que trust* may be adverse as against the trustee, they must be strictly confined to those cases where the *cestui que trust* holds the trustee at defiance and says to him "You are no trustee for me, and I utterly deny your title to be my trustee."

Possession of trustee,

As regards the possession of the trustee, where the trust appears on the face of the common title, that possession is referable to this title, by which such possession is guarded; and there cannot be any conflicting claim. If he be in possession, and do not execute his trust, his possession operates nothing as a bar, because it is according to his title, that is to say, according to the manifest right of the *cestui que trust*, against whose right therefore such possession cannot be set up (*s*); for it is consistent with and controlled by the title, of which the trust is the essence (*t*), and cannot become, as between the trustee and the *cestui que trust*, by any act of the trustee, inconsistent with, or opposed to, the title of the *cestui que trust*, and if the trustee convey to any one not for value the same result follows (*u*).

As long as the relation of trustee and *cestui que trust* exists, the possession of the trustee is the possession of the *cestui que trust* (*v*), or of his assignee (*w*), and *è converso* (*x*); and therefore the receipt of the rents from, or dealings with the trust estate by the permission of, the trustees, by a stranger for his own benefit for twenty years or upwards after the right of the *cestui que trust* to the trust estate has accrued, does not affect that right (*y*).

While the trustee remains in possession, the *cestui que trust* never loses title thereby as against the trustee;

(*s*) *Hovenden v. Lord Annesley*, 2 Sch. & L. 633; 9 Ir. Eq. Rep. 472.

(*t*) 9 Ir. Eq. Rep., N. S. 140.

(*u*) 1 Jo. & La T. 304.

(*v*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633; *Chalmer v. Bradley*, 1 Jac. & W. 67; 30

Beav. 175; 9 Ir. Eq. Rep., N. S. 140, 472; *Reed v. Fearn*, 14 W. R. 704.

(*w*) *Fruessett v. Carpenter*, 2 Dow & C. 232.

(*x*) *Supra*.

(*y*) *Lister v. Pickford*, 11 Jur., N. S. 649; 13 W. R. 827.

for although the trustee has the possession of the legal title to, and the control over, the property for the benefit of another person, yet he never can exclude that other person by the mode in which he has used the property. This is the sense in which courts of equity say there can be no presumption against a trust. But if by an alienation for value, in disaffirmance of the trust, the trustee repudiates the title under which he acquired the possession, the possession by the alienee becomes opposed to the title of the *cestui que trust*, and, if continued for twenty years, excludes such title (*z*).

In the case of guardian and ward, the guardian entering generally is presumed to enter as guardian (*a*), and neither he nor any person claiming under him (*b*) can set up any other title to the lands (*c*), and his possession is the possession of the ward (*d*), and as well of copyholds (*e*) as of freeholds, and, for some purposes at least, the actual possession or possession in fact of the ward (*f*).

A guardian in socage after entry has the legal possession of the land to the use of the infant (*g*). The form of pleading by a guardian in socage was, that he entered as such, and was possessed (*h*). To some purposes the infant, whose guardian in socage has entered and is in possession, is considered in law as not merely the owner in right, but the owner in actual seisin of the lands (*i*).

Any person entering into the land of an infant may —quasi guardian,

(*z*) 3 & 4 Will. 4, c. 27, s. 25; 9 Ir. Eq. Rep., N. S. 139.

(*a*) *Goodtitle v. Newman*, 3 Wils. 516.

(*b*) *Quinton v. Frith*, Ir. L. R., 2 Eq. 396.

(*c*) *Thomas v. Thomas*, 2 Kay & J. 79.

(*d*) *Ratcliffe's case*, 3 Rep. 42; Co. Litt. 15 a; *Whitcombe v.*

Whitcombe, Pre. Ch. 280; *Fbrder v. Wade*, 4 B. C. C. 520; *Goodtitle v. Newman*, supra.

(*e*) *Anon.*, Dy. 292 a; Co. Cop. s. 41.

(*f*) *Ratcliffe's case*, supra.

(*g*) 3 Ad. & E. 612.

(*h*) Per Bayley, J., *Rex v. Oukley*, 10 East, 493.

(*i*) 3 Adol. & E. 610.

be treated by the infant as his guardian, or *quasi* guardian, as will be shown in the next chapter, and as having entered for his use, and the possession of such person is the possession of the infant (*k*).

—solicitor,

A solicitor, with or without the consent of his client, paying off a mortgage debt of the latter, does not alter the relation between them, or, receiving the rents, is not a mortgagee in possession, but his possession is the possession of the client (*l*).

—servant,

The possession of a servant is the possession of, and therefore not adverse to, his master (*m*).

—receiver.

The possession of the receiver in a cause in equity is, for many purposes, the possession of the party entitled to the lands (*n*), or of the suitor (*o*), and that of the trustee in whom is vested the legal estate for the benefit of those entitled to it (*p*); and the court, when it takes possession by its receiver, cannot keep it for itself; but if it has to determine who is the person entitled to the property, the 3 & 4 Will. 4, c. 27, although it imposes a bar to a suit to recover possession after twenty years, imposes no bar to the court declaring who is entitled to the property in the possession of the court itself (*q*). The principle to be deduced from the cases, such as they are, as to the effect of the appointment of a receiver, is, that such appointment by interlocutory order is not in any way to affect the rights of the parties (*r*); and the appointment and the acting of the receiver, although the ap-

(*k*) *Doe d. Barnett v. Keen*, 7 T. R. 386.

(*l*) *Ward v. Carttar*, L. R., 1 Eq. 29.

(*m*) See *Doe d. Willis v. Birchmore*, 9 Ad. & E. 662; *Moore v. Doherty*, 5 Ir. L. R. 449. See also *Jack v. Walsh*, 4 Ib. 254.

(*n*) *Gressly v. Adderley*, 2 Swanst. 579; *Boehm v. Wood*, Turn. & R. 332; *Sharp v. Carter*, 3 P. W. 378; *Wrixon v. Vize*, 3 Dru. & War. 104.

(*o*) 3 Dru. & War. 123; 10 Ir. Eq. Rep. 377, 378.

(*p*) 10 Ir. Eq. Rep. 381.

(*q*) See *Dixon v. Gayfere* (No. 1), 17 Beav. 421.

(*r*) See *Anon.*, 2 Atk. 15; *Harri-son v. Duignan*, 2 Dru. & War. 295; *Wrixon v. Vize*, 2 Con. & L. 138; *Gresley v. Adderley*, 1 Swanst. 578; *Thomas v. Brigstocke*, 4 Russ. 65; *Groome v. Blake*, 6 Ir. C. L. R. 400; 8 Ib. 428, *S. C.*

pointment be extended for other persons than those for whom it was originally made, will not interrupt the continuity of the possession (*s*); and (*t*) the possession, when partly in a receiver of the Court of Chancery and partly in a prior incumbrancer, is not inconsistent with or opposed to the title of a subsequent incumbrancer, so as to affect under that statute his claim (*u*).

Sometimes and for some purposes the possession of the owner of the freehold is the possession of the owner of the inheritance. Thus the possession of the widow, tenant for life, of the ancestor is the possession of the heir sufficient to support a *possessio fratris* in him (*v*). So the possession of a tenant in tail is the possession of the remainderman, the estate in possession and the estate in remainder being for this purpose but one estate (*x*). So the possession by the heir of a copyholder before admittance is sufficient to make the collateral heir inheritable (*y*); but the possession of the tenant for life of the freehold is not the possession of the remainderman so as to enable the latter to maintain a writ of intrusion under the 32 Hen. 8, c. 2, s. 2 (*z*).

If an alien enter upon lands of a natural born subject, and hold them for twenty years, the possession will not avail against the rightful owner. For although land can be taken, and, until office found for the Crown, held by an alien (*a*), and after office found is taken by, and on the death of the alien before office found, vests, without any office, in the Crown (*b*); yet, with one exception of very recent origin, an alien cannot take by act of law even for the benefit of the Crown (*c*). The exception is of female aliens married to natural born

Possession of freehold where possession of the inheritance.

Possession of aliens.

(*s*) *Groome v. Blake*, supra.
 (*t*) Savigny on Possession, B. i. s. 12, p. 181, by Perry.
 (*u*) See *Wrixon v. Vize*, 2 Con. & L. 138.
 (*v*) *Small v. Dale*, Hob. 120.
 (*x*) *Doe d. Lord Teynham v. Webb*, 6 Bing. 395.

(*y*) *Anon.*, Dy. 291 a, pl. 69.
 (*z*) *Widdowson v. Earl of Harrington*, 1 Jac. & W. 532.
 (*a*) Co. Litt. 2 b; 5 Co. 52 b; 7 Ib. 25 a.
 (*b*) Co. Litt. 2 b; Plowd. 229.
 (*c*) *Calvin's case*, 7 Co. 25; Co. Litt. 31 b.

subjects. These aliens, on their marriage, become naturalized and acquire all the rights and privileges of natural born subjects (*d*).

Possession of things incorporeal strengthened.

Possession of things corporeal has been much strengthened by the Statutes of Limitation, and especially by the 3 & 4 Will. 4, c. 27, which, as between subject and subject, has defined and limited the remedies of persons relying upon previous title against possession (*e*).

Possession of advowsons.

The only actual seisin or possession of an advowson by the owner is presentation (*f*); and institution and induction are but as executions of the presentment (*g*). But the only seisin or possession which enables him to sustain a writ of right of advowson is by the admission, institution and induction of his presentee (*h*).

Enjoyment of prescriptive claims strengthened.

The enjoyment or *quasi* possession of claims which may be lawfully made at the common law by custom, prescription or grant to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of the Crown, or any land being parcel of the Duchy of Lancaster or of Cornwall, or of any ecclesiastical or lay person or body corporate, and also of claims which may be so made to any way or other easement, or to any watercourse or the use of any water to be enjoyed or derived upon, over or from any such land, and also of the access and use of light to and for any dwelling-house, workshop or other building (*i*), and also all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition, real or otherwise (*k*), has been strengthened and placed upon a more certain and therefore a more sure foundation. Some of these rights

(*d*) 7 & 8 Vict. c. 66, s. 16.

(*e*) See ss. 36, 37, 38; 15 Ir. Law Rep., N. S.

(*f*) See *Grendon v. Bishop of Lincoln*, Plowd. 498; Watson's Cler. 277; 3 Bulstr. 40.

(*g*) 1 Co. 99 b; 2 Ib. 93.

(*h*) Plowd. 528; F. N. B. 80 b; Vin. Ab., tit. "Seisin" (D) 3; sup. p. 102.

(*i*) 2 & 3 Will. 4, c. 71.

(*k*) 2 & 3 Will. 4, c. 100.

cannot now be defeated by merely showing the origin, and, after certain periods, varying with the nature of these rights, and when not had by some consent or agreement expressly made or given for the purpose in writing, all of them are rendered absolute and infeasible, as will hereafter appear.

CHAPTER VI.

THE EFFECT OF, AND THE BENEFITS ARISING FROM,
POSSESSION PROPER AND QUASI POSSESSION, AS BE-
TWEEN SUBJECT AND SUBJECT.

Importance of possession. THE importance of possession itself, and of maintaining it, has been frequently recognized and strongly urged in our courts of judicature (*a*). If after a succession of ages and the decease of parties objections to ancient possession, which might have been answered in the lifetime of the parties, and, if well founded, would most probably have been sooner made, were admitted, such possession would injure instead of strengthen a title (*b*). It has therefore always been the well-established principle of our law to presume everything in favour of long possession; and it is every day's practice to rest upon this foundation the title to the most valuable properties (*c*).

Presumption in favour of; but to support, and to defeat, right differ. For the purpose, and from a principle, of quieting possession, presumption is in favour of rights of which persons have been long in possession, although from mere length of time to support, is different when made to defeat, a right (*d*); and, said Lord Mansfield (*e*), the Court has thought that a jury should presume anything to support a length of possession. Littledale, J., also said (*f*), "We ought to make all reasonable presumptions in favour of the existing state of things." Sir T. Plumer, M. R., also said (*g*), "The first thing the court looks at

(*a*) 2 Inst. 118; supra, Book I. Chap. I., Sect. II. E. 281.

(*b*) *Bedle v. Beard*, 12 Co. 4, 5; Cowp. Rep. 110; 8 Ad. & E. 288; 8 Bing. 281.

(*c*) *Reg. v. Archdall*, 8 Ad. &

(*d*) Cowp. 110, 215, 216.

(*e*) *Eldridge v. Nott*, Cowp. 215.

(*f*) 4 B. & C. 605.

(*g*) *Att.-Gen. v. Lord Hotham*, Turn. & R. 217.

as the criterion of property is usage and enjoyment. Ancient deeds are exceedingly material, if followed up by possession, but if not followed up by possession, and if there has been a long enjoyment and uninterrupted possession in opposition to them, they lose that importance to which they would otherwise be entitled. Very high judges have said they would presume anything in favour of a long enjoyment and uninterrupted possession." Sir J. Romilly, M. R., also said (*h*), "Undoubtedly when a person or corporation is found possessed of, and in the enjoyment of, a right, the origin of which is not ascertained, the court will protect the possessor in the enjoyment of that right, and will presume anything, including, in some cases, even an act of parliament, that may be necessary for that purpose. Again (*i*), where the origin of a right is lost in obscurity, the court will presume, from the uniformity of the use, that it is in accordance with the original right, and will presume whatever may be necessary to give it validity." Lord Curriehill also said (*h*), "Possession which has existed from time immemorial, and of the commencement of which we have no trace, is presumed to go backwards, so as to connect with the titles of a more remote date (*l*)." . . . Another important attribute of such a possession is that it serves as an interpreter of the written title. "From long enjoyment of a privilege," said Lord Wensleydale (*m*), "every reasonable presumption may be made that it has continued from time immemorial, but where the privilege requires more than immemorial enjoyment in order to be legal and valid, some facts must exist besides mere long enjoyment; there must be some proof of these facts."

(*h*) 17 Beav. 390.

(*i*) *Ib.* 464.

(*k*) *The Lord Advocate v. Sinclair*, 3 Scotch Sess. Ca., 3rd series, 994.

(*l*) See also *Kyle v. O'Connor*, 16 Ir. Ch. Rep. 46.

(*m*) *Gann v. The Company of Free Fishers of Whitstable*, 35 L. J., N. S., Ch. 29.

Ground for
presuming
deeds,

From uninterrupted and long-continued possession, the existence of deeds and other suitable conveyances and all acts necessary to give them validity may be presumed. Such possession, however, creates only a presumption of fact and not of law, and is therefore always and in each particular case which may arise merely evidence of a grant or conveyance, not absolutely conclusive in itself, but to be weighed and considered by those whose duty it is to decide the issue to be determined (*n*).

—and other
matters,

Enjoyment under a title which can only be by record is strong evidence to be left to a jury that it did once exist (*o*). So a charter, after a usage of 350 years (*p*); a grant by the Crown in support of the title to an advowson (*q*), evidenced by deeds for nearly 140 years with three presentations by the possessors and none by the Crown (*r*); or resting upon possession and user for only thirty-five years (*s*); the extinguishment of fee-farm rents of the Crown after the lapse of 110 years without any payment of them (*t*), and the existence of a deed and of its execution by the Crown in the reign of Elizabeth (*u*), have been presumed, but only where the issue has been between subject and subject, and not *against* the Crown where the issue has been between the Crown and a subject (*v*). So also the induction of the incumbent of an ecclesiastical benefice, and the reading by him of the Thirty-nine Articles, after a possession by him for fifteen years, and in the absence of proof to the contrary, have been presumed (*x*), *omnia præsumuntur ritè esse acta* (*y*).

(*n*) 11 Gray's Amer. Rep. 36.

(*o*) Per Lord Mansfield, Cowp. 109.

(*p*) *Mayor of Hull v. Horner*, Cowp. 102.

(*q*) *Bedle v. Beard*, 12 Co. 45.

(*r*) *Gibson v. Clark*, 1 Jac. & W. 159.

(*s*) *Trotter v. Harris*, 2 You. & Jer. 285.

(*t*) *Simpson v. Gutteridge*, 1 Mad. 609.

(*u*) See *Att.-Gen. v. The Dean and Canons of Windsor*, 24 Beav. 679.

(*v*) Vide ante, pp. 94, 95.

(*x*) *Powell v. Milburn*, 3 Wils. 355; *Chapman v. Beard*, 3 Anstr. 942.

(*y*) On Presumptions generally,

But possession, although of long duration, ought to be consistent with the fact to be presumed. Thus a conveyance was not presumed where the original possession was accounted for, and was consistent with the fact of there being no conveyance, and had continued longer than was consistent with the original condition (*z*). So where a defendant in ejectment proves no right to the possession, no title, no conveyance, but rests on his own mere naked possession without any evidence how or when he acquired it, no presumption is to be made in his favour (*a*). So where the person to make a grant cannot lawfully make it (*b*), or might have been unable to interrupt or to prevent the exercise of the subject of the proposed grant (*c*), or the exercise of what is called a right (*d*), no grant by such person will be presumed. And a deed will not be presumed within a less time than that which is fixed by the Statute of Limitation for a bar to the claim (*e*).

—should be consistent with fact presumed.

We are not, however, to presume so much as to destroy the whole law: for, if upon mere possession everything is to be presumed to maintain that possession, there was no necessity for the Statute of Limitation (*f*). It will be better for every person in possession to burn his title deeds and rest wholly on presumption. In the case of the Crown and of the Church there was, and in some matters, as will be hereafter shown, still is, a maxim standing in the way. *Nullum tempus occurrit regi aut ecclesiæ* (*g*). Lord Denman, C. J., allud-

Extent of presumption to support possession.

Acts of parliament.

their classification, nature and application, see Mr. Best's excellent *Treatise on the Principles of the Law of Evidence*.

(*z*) *Doe d. Fenwick v. Reed*, 5 B. & Ald. 232.

(*a*) *Doe d. Hammond v. Cooke*, 6 Bing. 174.

(*b*) *Goodtitle v. Baldwin*, 11 East, 488; *Barker v. Richardson*, 4 B. & Ald. 579; *Mill v. Commissioner of New Forest*, 18 C. B. 60.

(*c*) *Chasemore v. Richards*, 7 H. of L. Cas. 349.

(*d*) *Webb v. Bird*, on Error in Exchequer Chamber, 13 C. B., N. S. 844.

(*e*) See *Eldridge v. Knott*, Cowp. 214; *Rees v. Lloyd*, 1 Wightw. 123; *Doe d. Wilkins v. Marg. Cleveland*, 9 B. & C. 864.

(*f*) 3 Gwill. 1176; 1 Mad. 245.

(*g*) Vide Book I. Chap. II. Sects. I. and II.; Chap. IV. of this Book.

ing to the dicta of some great judges, that they would presume even an act of parliament, if necessary, in support of an ancient usage, said (*h*), “ Even this strong presumption it might not be unreasonable to make where the usage has been such as nothing but an act could legalize, and has prevailed in those obscure ages in which, not only the records of parliament may have been negligently kept, but even the form of a parliament itself is scarcely to be discerned. But no judge would venture to direct a jury that they could affirm the passing of an act of parliament within the last 250 years on an important subject of the most general interest, of which no vestige can be found on the parliament roll, in the journals of either house of parliament, in the numerous treatises of enlightened authors, devoting unwearied industry and the greatest accuracy to similar inquiries, or in the history of the country.”

Grants from
the Crown.

When the real origin of a right is shown and clearly ascertained, and that origin negatives the presumption, nothing is ever, or can be, presumed to the contrary of that which is established by evidence (*i*). A grant therefore from the Crown appearing on evidence to be enrolled of record, but not produced, cannot be presumed upon mere evidence of user (*k*).

General effect
of possession.

“ Uniform possession,” said Lord Lyndhurst, C. (*l*), “ during a long series of years, establishes a title. That is a great principle in our law, and in the law of every civilized country—a principle which we have drawn from the wise jurisprudence of ancient Rome. . . . If a party has obtained possession of property, even by a flagrant act of violence, yet, if he be allowed to continue in the uninterrupted possession of that property for a long series of years—indeed, for not a long period

(*h*) *Reg. v. The Pres. and Chap. of Exeter*, 12 Ad. & E. 512.

(*i*) Per Sir J. Romilly, M. R., 17 Beav. 464.

(*k*) *Brune v. Thompson*, 4 Q. B. 543.

(*l*) Debates in D. P. on the Dissenters' Chapel Bill, 1844.

according to our present law—his title becomes absolute and indefeasible. The person who is dispossessed may go into a court of justice and say, ‘I am wrongfully dispossessed—I am ready to prove it,—I can give you the most distinct evidence of the fact.’ The answer is, ‘An indefeasible title has been acquired against you by lapse of time; and this is built on a wise principle of law,—evidence is lost by lapse of time, witnesses die, testimony is gone, and parties are no longer able to establish by distinct evidence and proof what their rights were.’ Time effects all this. The lapse of time has also its counteracting effect. It establishes by continued possession, gives another title balancing and replacing the title that has been lost. . . . The principle has been extended in modern times to cases which show how much importance is attached to it, and how much it is valued.”

In naked possession, the probability that the possessor has the property is no greater than that he has it not. But there is a possibility of property in him, and this possibility confers on him benefits in matters of fact, in suing and in being sued. The presumption of law is, that he has the property (*m*), and the possession is evidence (*n*), but only evidence (*o*), of property; and, no other evidence appearing in proof, evidence of ownership in fee (*p*). If, said Mr. Justice Story (*q*), a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership and seisin of the inheritance. But it is not the possession alone, but the possession accompanied with the claim of the fee, that gives this effect, by con-

Benefits to the possessor of things corporeal.

(*m*) 7 Mee. & W. 595; 5 Ell. & Bl. 806.

(*n*) 1 Ad. & E. 121; 8 Ad. & E. 879; 5 Ell. & Bl. 806; 13 Q. B. 953.

(*o*) 7 Mee. & W. 312; 8 Ad. & E. 879.

(*p*) 9 Rep. 27 b; *Rowe v.*

Grenfel, Ry. & Moo. 396; 1 Hare, 60; *Doe d. Carter v. Barnard*, 13 Q. B. 953; 14 W. R. 27; 7 Bing. 846. See also *Brest v. Lever*, 7 Mee. & W. 593; *Denn v. Barnard*, Cowp. 595.

(*q*) 5 Curt. Amer. Rep. 224.

struction of law, to the acts of the party. Possession, *per se*, evidences no more than the mere fact of present occupation by right, for the law will not presume a wrong; and that possession is just as consistent with a present interest under a lease for years, or for life, as in fee. From the very nature of the case, therefore, it must depend upon the collateral circumstances, what is the quality and extent of the interest claimed by the party; and to that extent, and that only, will the presumption of law go in his favour. And the declarations of the party, while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of possession, adjudge him to be in under a higher right, or a larger estate. If, indeed, the party be in under title, and, by mistake of law, he supposes himself possessed of a less estate in the land than really belongs to him, the law will adjudge him in possession of, and remit him to, his full right and title. For a mistake of law shall not in such case prejudice the right of the party; and his possession, therefore, must be held co-extensive with his right. This is the doctrine of Littleton (*r*). Although, therefore, mere possession be for less than twenty years, yet the land goes to the heir or the devisee of the possessor, and not to his executor (*s*). The presumption of law just mentioned cannot be rebutted by evidence, offered as a defence by a person admitting himself to have no title, and to be a wrongdoer on acquiring the possession, that the property was in a third person (*t*), but may be rebutted by evidence so offered by a person in possession not merely as a wrongdoer (*u*).

(*r*) Sect. 695.

(*s*) *Doe d. Pritchard v. Jauncey*, 8 Car. & P. 99; *Asher and Ux. v. Whitelocke*, L. R., 1 Q. B. 1; 35 L. J., N. S., Q. B. 17; 14

W. R. 26, S. C.; *Clarke v. Clarke*, I. R., 2 C. L. 395.

(*t*) 5 El. & B. 806.

(*u*) *Doe d. Carter v. Barnard*, 13 Q. B. 945.

Amongst the benefits to the possessor in suing may be noticed the remedies incident to his possession, for asserting his right to, and for maintaining it, and his position in pursuing those remedies. Naked possession alone, independent of the period of its duration, and of the title of the possessor, enables the possessor or his heir (*x*), or his devisee (*y*), to maintain ejectment (*z*) —ejectment, against any person who stands neither on any former possession of his own, nor derives title under the possession of any other person, and although the actual possession be wrongful as against third persons (*a*), even against the Crown (*b*)—in other words, against mere wrongdoers, and also against persons claiming through another person admitted to be a tenant, but who acquired the possession through the testator of the lessor of the plaintiff, but giving no evidence of title in themselves (*c*); and also against strangers to the actual possessor, who is in as either tenant or servant to the testator of the lessor of the plaintiff (*d*); for a tenant or a servant in possession, or those claiming under him, cannot dispute the title of his landlord or master, or of those claiming under him (*e*). “Against a wrongdoer,” said Lord Campbell, C. J. (*f*), “possession is a title; and I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers.” A person —trespass, having a right to land acquires by entry the lawful possession of it, may maintain trespass against any

(*x*) *Doe d. Pritchard v. Jauncey*, 8 Car. & P. 99.

(*y*) *Asher and Ux. v. Whitelocke*, *supra*.

(*z*) *Doe d. Hughes v. Dyeball*, 1 Moo. & M. 346; 3 Car. & P. 610, S. C.; *Davison v. Gent*, 26 Law J., Ex., N. S. 122; *Every v. Smith*, *Ib.* 344; *Asher and Ux. v. Whitelocke*, *supra*.

(*a*) 5 B. & Ald. 603.

(*b*) *Harper v. Charlesworth*, 4

B. & C. 594.

(*c*) *Doe d. Willis v. Birchmore*, 9 Ad. & E. 662.

(*d*) *Ib.*

(*e*) *Doe d. Knight v. Lady Smythe*, 4 M. & S. 347; *Doe d. Bullen v. Mills*, 2 Ad. & E. 17; *Doe d. Willis v. Birchmore*, *supra*; *Att.-Gen. v. Lord Hotham*, 1 Turn. & R. 210.

(*f*) 5 Ell. & B. 805.

person who, being in possession at the time of the entry, wrongfully continues upon the land, and need not declare, on making the entry, that he enters to take possession, for any act showing his intention is sufficient (*i*). Possession for twenty years gives such a right to the property as to preserve the possessor against mere entry by a former claimant having title immediately before such possession, and as will support an act of ejectment against all persons not having a better title (*k*). And even possession for a period short of twenty years enables the possessor to maintain such action against a person who has had mere possession for a less period (*l*), and as against a mere wrongdoer to recover both upon his own title and upon his prior possession, and, failing on his title, to rely on such possession (*m*). But the possession must be exclusive (*n*).

A person, however, not in actual possession cannot maintain an action of trespass (*o*), for it is founded on actual possession, and the person bringing such action must have either the actual possession or the general property, which brings possession to him (*p*). Therefore a mere right to enter upon land, and to do certain acts, confers no sufficient possession. But where persons erected at their own expense, and with their own materials, upon land, with the consent of the owner of the soil, a dam for a special purpose, they were held entitled to the possession of the dam until

(*i*) *Butcher v. Butcher*, 7 B. & C. 399; *Catteris v. Corper*, 4 Taunt. 547; *Harker v. Birkbeck*, 3 Burr. 1556; *Graham v. Peat*, 1 East, 244; *Corry v. Holt*, 11 East, 70, n.; *Chambers v. Donaldson*, 1b. 65; 7 Mee. & W. 312; *Heath v. Milward*, 2 Bing. N. C. 98; *Matson v. Cook*, 4 1b. 392.
(*k*) *Sticker v. Burney*, 1 1d. Raym. 741; 2 Salk. 421; *Doe d. Harding v. Cooke*, 7 Bing. 346. See also *Denn v. Barnard*, Cowp. 595.

(*l*) *Doe d. Carter v. Barnard*, 13 Q. B. 945.

(*m*) *Darison v. Gent*, 26 L. J., Ex., N. S. 122; *Ecery v. Smith*, 1b. 344.

(*n*) *Stooks v. Booth*, 1 T. R. 428; *Recett v. Brown*, 5 Bing. 7.

(*o*) *Litchfield v. Ready*, 5 Ex. 939; *Mayhew v. Scuttle*, 4 Ell. & B. 347; *Ryan v. Clark*, 14 Q. B. 73.

(*p*) *Duke of Newcastle v. Clark*, 8 Taunt. 631; *Hollis v. Goldfinch*, 1 B. & C. 218.

that purpose was completed, and therefore to maintain trespass against a wrong-doer (*q*). A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession (*r*).

Naked possession enables the possessor also to distress —distress. damage-feasant the cattle of a stranger who has no title (*s*).

The enjoyment or *quasi* possession of things or rights incorporeal for twenty years is sufficient to sustain an action on the case for the disturbance of them (*t*). In relation to things incorporeal. Action on the case: —ferry;

In the case of a ferry the creation of it must be by grant or licence from the Crown (*u*), and the owner, although he must have a right to use the land on both sides of the water, needs not have the property in the soil on either side (*v*), and the ferry is thus a mere *jus in re*, or thing incorporeal, and the mere user and enjoyment of it by the person exercising them is, as against mere wrongdoers, a sufficient possession and title (*x*); and in an action for a disturbance of the ferry, such person has merely to prove his possession, and the existence of the ferry for a long period of time (*y*), without the production of the grant or licence from the Crown, and the existence of the ferry for a length of time and the possession of it by the claimant, in the exercise of a right which, if it could not exist but by deed, are grounds for the presumption that the ferry was legally created (*z*). If, however, instead of the action being merely in relation to the possession, the

(*q*) *Dyson v. Collick*, 5 B. & Ald. 600.

(*r*) 12 Ad. & E. 629.

(*s*) Plowd. 431.

(*t*) *Holcroft v. Heel*, 2 Wms. Saund. 175, n.; 1 Bos. & P. 400.

(*u*) Hardr. 163; *Blissett v. Hart*, Willes' Rep. 508.

(*v*) *Peter v. Kendal*, 6 B. & C. 708; 14 Q. B., N. S. 29.

(*x*) *Blissett v. Hart*, supra; *Peter v. Kendal*, supra.

(*y*) *Peter v. Kendal*, supra.

(*z*) *Trotter v. Harris*, 2 You. & Jer. 285.

title of the plaintiff be in question, the grant or licence must be shown, or such evidence of ancient user adduced as will satisfy a jury that the ferry was so created, although the grant or licence be not forthcoming (*a*).

—pew.

• The possession, or *quasi* possession, by user of a seat in a church is merely the privilege of sitting in such seat (*b*) for the special purpose of attending divine service (*c*); and when not annexed to any house is not such a temporal right as that in respect of it an action at common law for a disturbance in the exercise is maintainable (*d*). But if claimed as so annexed, the user for a long period is sufficient to sustain such action (*e*), and without proof of repairs, although they are alleged in the declaration (*f*), and either at common law (*g*) or in the ecclesiastical court (*h*). And proceedings in the latter court, in which the claimant failed to establish his right to the seat, are not *conclusive* evidence against him in an action at law against a mere disturber of the right (*i*).

The uniform and exclusive possession of the inhabitants of a particular messuage, connected with the burthen of maintaining and repairing the seat, is sufficient evidence to establish a prescriptive title to the seat (*k*); and in ordinary cases, the user or *quasi* possession, and no evidence of the origin of it, raises, in an action against a mere wrongdoer, a presumption of right in the person exercising such user (*l*).

But if the seat be claimed and alleged as annexed to a house in the parish, yet, if the origin of the pew

(*a*) See 2 You. & Jer. 288.

(*b*) See *Mainwaring v. Giles*, 5 B. & Ald. 362.

(*c*) 8 B. & C. 294.

(*d*) *Stooks v. Booth*, 1 T. R. 428; *Mainwaring v. Giles*, *supra*.

(*e*) 12 Co. 106; Co. Litt. 121 b, 122 a; *Rogers v. Brook*, 1 T. R. 481, n.; *Kenrick v. Taylor*, 1 Wils. 326; 8 B. & C. 295.

(*f*) *Kenrick v. Taylor*, *supra*.

(*g*) *Pittman v. Bridger*, 1 Phill. 316.

(*h*) *Cross v. Salter*, 3 T. R. 639.

(*i*) *Corwen's case*, 12 Co. 105; per Sir J. Nicholl, 1 Phill. 325; *Lousley v. Hayward*, 1 You. & Jer. 583.

(*k*) *Griffith v. Matthew*, 5 T. R. 296; 3 M. & Ry. 395.

(*l*) *Cross v. Salter*, *supra*; *Lousley v. Hayward*, 1 You. & Jer. 583.

itself in which the seat is claimed be shown, the possession, even for a long period, would be insufficient to maintain an action against a mere disturber(*m*).

In the absence of evidence against the right the enjoyment of a pew claimed in respect of a house *not* in the parish is sufficient to maintain an action on the case against a mere disturber. For the house, although not now within the present boundaries of the parish, may be presumed to have been formerly within the ecclesiastical limits of the church(*n*).

The *quasi* possession of a seat in a church is not sufficient to enable the possessor to maintain, even against a mere disturber, an action of *trespass*, for the possession necessary to maintain an action of that nature must be exclusive(*o*), and the possession of the church is in the parson(*p*). The only remedy which the claimant of such a right has, either against a mere disturber, or any other person, besides the remedies in the ecclesiastical court, is an action on the case at common law(*q*).

Amongst the benefits to the possessor, in being sued, may be noticed the highly important one of having the *onus probandi*, or burden of proof, thrown on, and if no proofs are offered on either side, or no sufficient proofs on the side of his adversary(*r*), of being entitled to succeed against him, even where the Crown is the adversary, after a possession of the land for twenty years without disturbance(*s*). For the adversary must recover upon the strength of his own title(*t*), and cannot recover

Trespass:
—pew.

On being sued
the *onus pro-*
bandi shifted.

(*m*) *Griffith v. Matthew*, 5 T. R. 296; *Morgan v. Curtis*, 3 Man. & Ry. 889.

(*n*) *Lousley v. Hayward*, 1 You. & Jer. 583.

(*o*) *Revett v. Brown*, 5 Bing. 7; sup. p. 128.

(*p*) *Stocks v. Booth*, 1 T. R. 428.

(*q*) *Stocks v. Booth*, 1 T. R. 428; *Mainwaring v. Giles*, 5 B. & Ald. 361; 3 Bing. 138; 8 B. & C. 294.

(*r*) Sav. Poss. B. i. ss. 3, 6; 2 Jac. & W. 164; Best on Evidence, ss. 273, 323.

(*s*) 21 Jac. 1, c. 14; *Att.-Gen. v. Parsons*, 2 Mee. & W. 23.

(*t*) *Allen v. Rivington*, 1 Saund. 111; *Frogmorton d. Fleming v. Scott*, 2 East, 467; *Goodtitle d. Parker v. Baldwin*, 11 East, 488; 15 Ir. Law Rep., N. S. 289.

on the weakness of that of the possessor, who has a right against every man who cannot show a better title (*x*); and when the possession is lawful, and not that of the lessor of the plaintiff in ejectment, the possessor may defend himself upon his title, though twenty years have run against him before he took possession (*y*), and there is nothing in the sections 2 and 3 of the statute 3 & 4 Will. 4, c. 27, or in the authorities by which they have been expounded, to abridge the protection given to possession, or to shift from the plaintiff the burden of proving a possessory title unbarred by the Statute of Limitations (*z*). If, however, the possessor prove no right to the possession, no title, no conveyance, but rests on his mere naked possession without any evidence how or when he acquired it, he is not in a condition to call for any presumption in his favour (*a*); and where he relies upon his possession alone, and it can be referred to a conveyance by a tenant in tail barring himself only and not his issue, the possession will be so referred, and the heir in tail plaintiff in ejectment need not explain the possession or show that the conveyance was not by fine or recovery (*b*).

Lord St. Leonards v. Ashburner.

General advantages of the Statutes of Limitation.

At the Spring Assizes, 1869, held at Lewes before Mr. Baron Bramwell, was tried a case (*c*) which furnishes a clear, decisive, and important illustration as well of the policy, the benefits, and the great public advantage

(*x*) *Sticker v. Burney*, 1 Lord Raym. 741; 2 Salk. 421; *Doe d. Harding v. Cooke*, 7 Bing. 346; *Roe d. Haldane v. Harvey*, 4 Burr. 2487; *Doe d. Crisp v. Barber*, 2 T. R. 749; *Doe d. Rogers v. Mears*, Cowp. 129; *Doe d. Carter v. Barnard*, 13 Q. B. 945; 1 East, 244.

(*y*) *Doe d. Burrough and Uz. v. Reade*, 8 East, 358.

(*z*) 15 Ir. Law Rep., N. S. 288.

(*a*) *Doe d. Hammond v. Cooke*, 6 Bing. 174.

(*b*) *Doe d. Smith v. Pike*, 3 B. & Ad. 788.

(*c*) *Lord St. Leonards v. Ashburner.*

in general of the Statutes of Limitation, as of the sufficiency of naked possession against a mere wrongdoer, and of the propriety of using those statutes as a protection against imaginary claims.

The action was ostensibly one of trespass, but in reality to try the title to the land in question. The possession of the plaintiff had existed for forty years, and on various occasions during that period he exercised acts of ownership, such as planting trees on the land, cutting them down, sporting over the land, and beating the boundaries. This possession and these acts he proved and relied upon, without producing any documentary evidence of his title. Title deeds, said the learned baron, come to little without evidence of actual enjoyment, for otherwise any of them might pretend to give away the land of anybody else. Parchment comes to little. The great question is as to actual enjoyment.

Naked possession, with acts of ownership, against a wrongdoer.

The noble and learned plaintiff refused the production of any of his title deeds, and Mr. Baron Bramwell said the refusal had his sympathy, as entirely in accordance with sound sense, with justice, and with law. For it appeared to him extremely hard that a man should commit a trespass upon the land of another, and then say to him, "Produce your title deeds and show that the land is yours!" Surely he might fairly answer, "You have no right to call upon me to do so, for I am in possession and you are a trespasser. Produce your own deeds."

Non-production of title deeds.

The learned baron also said that he should be sorry if it were ever supposed that a man may not righteously take advantage of such a title. A great jurist had justified it on the ground that it was much harder that a man should lose what he had long held, under the impression that it was his, than that another should get what he had never had, and never supposed to be his (*d*).

Propriety of using the statutes as a defence.

BOOK III.

PRESCRIPTION AT COMMON LAW.

CHAPTER I.

THE NATURE OF SUCH PRESCRIPTION.

Prescription
in general,
what.

PRESCRIPTION, the mother of repose (*a*), in the largest acceptation of the term, is a title to things either corporeal or incorporeal by the mere enjoyment thereof for the time allowed by law; as to things corporeal by possession, in the Roman law called *usucaption*, and as to things incorporeal by *quasi* possession, or immemorial usage merely, *ex usu et tempore* (*b*).

Prescription
at common
law.

Prescription, however, as applied to the acquisition, by immemorial usage, of things incorporeal or rights, either as incident to things corporeal, or as not so incident but in gross, and whether by prescription, as contradistinguished from custom, or by custom, is termed prescription at the common law by immemorial usage, as contradistinguished from the statutory time of limitation, and is where a custom, or usage, or other thing, hath been used, for time whereof mind of man runneth not to the contrary (*c*), or, as Lord Coke says, a title by use and time allowed by the law, a mere usage *in pais* (*d*); and consists of two branches, namely, prescription commonly so called in contradistinction to custom, and custom.

Consists of
prescription
proper and
custom.

Differences
between them.

Prescription and custom, as distinguished from each other, although having in many respects, as will be

(*a*) Plowd. 357, 368; 2 Inst. 202.

(*b*) Bract. lib. ii. c. 22; Co. Litt. 113 a; 3 Cru. Dig. tit. xxxi. c. i. s. 1. Supra, Book II.

(*c*) Litt. a. 170; Co. Litt. 113 a, b, 114 a, b, 115 a, b, 121 b, 122 a, b.

(*d*) Co. Litt. 113 a, b.

hereafter shown, several qualities in common, yet differ in several essential particulars. The difference consists chiefly in the origin, with reference to the common law, in the persons who may claim, in the things which may be claimed by each of these titles, and in the mode in which, in pleading and otherwise, these titles are alleged or stated. The characteristic difference between the two titles most commonly stated is, that prescription properly so called is personal, whilst custom is local (*e*). Prescription and custom, said Coke, C. J., are brothers, and ought to have the same age, and reason ought to be the father, congruence the mother, use the nurse, and time out of memory to fortify both (*f*). Sometimes they are indeed said to be of contrary natures and incompatible, and cannot give being to the same thing (*g*), and sometimes all one (*h*); and that any difference between them consists rather in the manner in which they are claimed, and pleaded, than in their nature (*i*). Their essential differences will appear in the next two chapters.

Prescription and custom have been said to be so far of contrary natures and incompatible, that they cannot give being to the same thing (*k*). "Whether," said the court in *Blewett v. Tregonning* (*l*), "a prescriptive and a customary right to the same privilege can by possibility exist in respect of the same land, if each be distinctly proved by proper evidence applicable to each, was an abstract question not necessary to decide" (*m*); but the court held that the same evidence which would prove a prescriptive right could not be used to prove a customary one.

Cannot give title to the same thing.

(*e*) Co. Litt. 113 b; *Jenkin v. Vician*, Poph. 201; 2 Com. 263.

(*f*) *Rowles v. Mason*, 2 Brownl. 192, 198.

(*g*) 1 Vent. 389.

(*h*) Cro. El. 363; *Day v. Saradge*, Hob. 85.

(*i*) 1 Vent. 389; *Clarkson v. Woodhouse*, 5 T. R. 412, n.

(*k*) 1 Vent. 389 *et seq.*

(*l*) 3 Ad. & E. 554, 588.

(*m*) See also *Padwick v. Knight*, 7 Ex. 854.

A prescriptive right may be neither.

A prescriptive right, however, may be neither a prescription properly so called, nor a custom, but in its nature between the two. Thus a local prescription to privilege persons in a certain place and condition is not a custom, because it concerns the discharge of persons and is merely local; nor a prescription, because not annexed to any estate or any person, but in relation to a certain place and condition, and yet is rather termed a prescription, being by way of discharge (*p*).

Inseparable incidents to prescription at common law.

The two inseparable incidents to a title by prescription at common law are possession or usage and time, and the usage must be long, continual and peaceable (*q*), or, in technical language, "for time whereof mind of man runneth not to the contrary," that is, that no man alive has heard any proof, or has any knowledge to the contrary (*r*); and in pleading such a title it ought to be expressed by time out of mind (*s*), or by some equivalent expression (*t*). That time is from the first day of the reign of King Richard the First, 1189, and the proof may be, either by record, or sufficient matter of writing, or by a man's own proper knowledge; and the former proof, although it exceed the memory, or proper knowledge of any man living, is within the memory of man (*u*).

Effect of the incident of time.

The consequence of this is, that a claim by prescription, however reasonable in itself, if shown to have commenced within this period, cannot be sustained. A bad and mischievous law, and one which is discreditable to us a civilized and an enlightened people, and fraught with inconvenience in many cases in its application (*x*).

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|---|--|
| (<i>p</i>) <i>Day v. Savadge</i> , Hob. 86; | (<i>t</i>) See <i>Rea v. Genge</i> , Cowp. |
| 1 Ventr. 389, 390. | 13. |
| (<i>q</i>) Co. Litt. 113 a, b. | (<i>u</i>) Co. Litt. 115 a. |
| (<i>r</i>) Litt. s. 170. | (<i>x</i>) <i>Bryant v. Foot</i> , 7 B. & S. |
| (<i>s</i>) <i>Goodwin v. Brooks</i> , T. | 725. |
| Jones, 228. | |

CHAPTER II.

PRESCRIPTION COMMONLY SO CALLED AND AS DISTINGUISHED FROM CUSTOM.

SECTION I.

The Nature of Prescription as distinguished from Custom.

BESIDES usage from time immemorial (*a*), as such time is understood in law (*b*), already stated, every prescription, as distinguished from custom, must be lawful in itself (*c*), reasonable (*d*), or, as sometimes negatively expressed, not against reason (*e*); which is not to be understood of every unlearned man's reason, but of artificial and legal reason warranted by authority of law, *lex est summa ratio* (*f*); and certain (*g*) in its nature, and as to the thing claimed (*h*), or the thing out of which the right claimed issues (*i*), and as to the persons claiming (*k*), and, where claimed in a *que estate*, as to the lands in respect of which the claim is made; as a modus in satisfaction of tithes arising upon specific lands is a

Requisites of prescription proper.

(*a*) Vide last Chapter.

(*b*) Co. Litt. 110 b, 118 b; Dow, 32 *a et seq.*

(*c*) Com. Dig. Prescription, F. 2.

(*d*) Ib. E. 4; *Coryton v. Lethaby*, 2 Saund. 117; *Bailey v. Stephens*, 12 C. B., N. S. 91; *Willingale v. Maitland*, 12 Jur., N. S. 932; *Hilton v. The Earl Granville*, 5 Q. B. 701; *Blackett v. Bradley*, 1 B. & S. 940; *Wakefield v. The Duke of Buccleugh*, 15 W. R. 783; *Paddock v. Forrester*, 3 M. & G. 903; *Att.-Gen.*

v. Matthias, 4 Jur., N. S. 628; *Lawrence v. Hitch*, L. R., 3 Q. B. 521.

(*e*) Litt. ss. 80, 209, 212; Plowd. 399.

(*f*) Co. Litt. 62 a; Willes, 204.

(*g*) Com. Dig. Prescription, E. 3; *Att.-Gen. v. Matthias*, sup.

(*h*) *Luttrell's case*, 4 Co. 86 a.

(*i*) *Wolden v. Bridgewater*, Cro. El. 421.

(*k*) *Pain v. Patriok*, 3 Mod. 290; *Willingale v. Maitland*, sup.; *Constable v. Nicholson*, 14 C. B., N. S. 280.

prescription for the right or privilege as annexed to particular lands, and can no more exist without a certainty in the lands to which it is annexed, than a shadow without a substance (l).

Involving
uncertainty,
but reducible
to certainty.

A prescription may involve, *primâ facie*, some uncertainty but be reducible to certainty, and therefore, in that particular, free from objection; thus a prescription to take yearly a profit by divers persons out of a certain number of acres to be allotted amongst them yearly in *alternis vicibus*, parcel of a larger number, being certain as to the number of acres from which the profit is to be taken, is not rendered uncertain by the variation after each year of the particular acres, or the place where they lie; for the yearly allotment determines the certainty of both, and *certum est quod certum reddi potest* (m).

The claim may be *primâ facie* unreasonable and uncertain, but, interpreted by the grant presupposed in every prescription, may be, according to the same maxim, both reasonable and certain. Thus where the owners and the occupiers of a farm claimed the sole and exclusive right of pasture and feeding of sheep and lambs on certain land, as a right belonging and appertaining to the farm, not the sheep and lambs of the claimants, but sheep and lambs generally, without restriction; and the question was as to the extent of the right as respects the sheep and animals to be fed, and was determined on the principle to be applied in the interpretation of the assumed grant on which the prescription was founded. This principle, the court said, seems to be to ascertain the extent of the rights conferred, and the rights reserved, by the grant, and to see whether the act be in derogation of the latter. By the terms of this prescription the grantees' right is limited

(l) *Bennett v. Read*, 1 Anstr. 322, 329.

(m) *Weldon v. Bridgewater*, Cro. El. 421.

to the feeding of sheep and lambs. This would be wholly insensible if the entire pasturage were granted to him in exclusion of the lord. Further, the right to feed by sheep is not limited by number, so as to make it indifferent to the lord by whose sheep the pasturage is enjoyed, but is a grant to the occupier of, and is appurtenant to, the farm. Some interest in the pasturage being reserved to the lord, the questions are,—what is that interest?—and is the taking relied on in derogation of it? The court thought the most reasonable conclusion was that the lord's interest was in the consuming, by the mouths of his cattle and horses, whatever was not required for the sheep and lambs levant and couchant on the farm (*n*), and that from the language of the whole prescription the taking was injurious to such right. The claim therefore was restricted to the sheep and lambs of the owners and occupiers of the farm, and was held not to authorize the pasturing and feeding by them of the sheep and lambs of strangers (*o*).

In all prescriptive rights the claim, in order to be valid, must be made with some limitation and restriction, both as to the thing to be taken, and the time for taking it (*p*). Even claims of right *in alieno solo* not by prescription, in order to be valid, must be made with some limitation and restriction. Therefore an indefinite claim to enter upon and to take out of and from a certain close all the clay in it is, in effect, to take the whole close, and cannot be sustained (*q*).

Restrictions
for its validity.

Every prescription, as distinguished from custom, ought to have by common intendment a lawful beginning (*r*); and the general rule is that every prescrip-

Its origin must
be lawful.

(*n*) Co. Litt. 122 a.

(*o*) *Jones v. Richard*, 5 Ad. & El. 413; 6 Ib. 530, on error.

(*p*) See *Blewett v. Tregonning*, 3 Ad. & E. 554; 6 Q. B. 419 *et seq.*, and cases cit.

(*q*) *Clayton v. Corby*, 5 Q. B. 415.

(*r*) *Gateward's case*, 6 Co. 59; 1 T. R. 667; Doug. 126; 1 Cl. & F. 354.

tion, which by any possibility can be supposed to have had a legal commencement, is good (*s*). This commencement is by a presupposed grant; for prescription is allowed only to supply the loss of a grant. Ancient grants must often be lost, and it would be hard that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant, and a lawful beginning, and allows such usage for a good title, but still only to supply such loss (*t*). And although the usage may not have been from time immemorial, yet if it can have had a lawful origin within time of memory, such lawful origin ought to be, and will be, presumed (*u*).

Its validity determined by that of the presupposed grant.

Assuming then such a grant to have been made, the validity of it will determine the validity of the prescription and therefore requires consideration (*v*). In such supposed grant, the capacity of the grantor to make, of the grantee to take under, and of the thing claimed by prescription as the subject of it, to pass by such grant, would be essential to its validity. If the subject claimed were a judicial office in Ireland, then as that part of the United Kingdom did not come under the dominion of the Crown of England until after the time of legal memory, the Crown could not grant such an office there (*x*); or if the thing claimed be claimed against a corporation created within that time (*y*); or a person

(*s*) Per Ashhurst, J., *Lord Pelham v. Pickering*, 1 T. R. 660, 667.

(*t*) Bro. Abr. Custom, pl. 46; Vent. 387; Dow, 33 b.; *Rowles v. Mason*, 2 Brownl. 196, 198; *Blundell v. Catterall*, 5 B. & Akl. 298, Judgment of Holroyd, J., 295, 296, 297; *Lockwood v. Wood*, 6 Q. B. 50, 64; *Gibson v. Clark*, 1 Jac. & W. 159; *Paddock v. Forrester*, 3 M. & G. 908; *Constable v. Nicholson*, 14 C. B., N. S. 230; *Carter v. Murcut*, 4 Burr. 2162,

2165; *Att.-Gen. v. Matthias*, 4 Jur., N. S. 628.

(*u*) *Lawrence v. Hitch*, L. R., 3 Q. B. 521.

(*v*) See *Jones v. Richard*, 6 Ad. & E. 530.

(*x*) See *Ex parte Shaw*, Beatty, 24, 34.

(*y*) Co. Litt. 102 b; *Pitts v. Gaince*, 1 Lord Raym. 558; *The King and Edwards v. The Bailiffs of Allborough*, 1 Keb. 308; *Att.-Gen. v. Luton Board of Health*, 2 Jur., N. S. 180.

incapable of making a grant (*z*); or if the thing claimed be claimed by such a corporation, or by a class of persons not incorporated and having no capacity to take by grant from a private person, as the parishioners or inhabitants of a certain place (*a*), at least where the thing claimed is a benefit or profit *in alieno solo*, and not a mere easement only (*b*), although they may have such capacity if the grant to them were from the Crown (*c*); or by persons who, although originally having such capacity, have been since deprived of it (*d*); or the thing claimed could not have been the subject of a grant, as the offices just mentioned, or an office created since the time of legal memory; or the subject of the prescription has been the subject of a grant made since that time (*d*); or the grant of the thing would be unreasonable, or absurd and an impossibility (*e*), for the supposed grant should correspond to the user; and where the right is claimed in or out of land, the grant should be such as may and does include the whole of the land (*f*).

The extent of a prescriptive right is sometimes determined by ascertaining what would be the interpretation of the presupposed grant on which the prescriptive right is founded (*g*).

And also its extent.

(*z*) See *Bryan v. Whistler*, 8 B. & C. 288; *Barker v. Richardson*, 4 B. & Ald. 579.

(*a*) Co. Litt. 3 a; Touch. 237; *Abbott v. Weekly*, 1 Lev. 176; 4 Co. 32; *Gateward's case*, 6 Ib. 59; *Fitch v. Rawling*, 2 H. B. 393; *Tyson v. Smith*, 9 Ad. & E. 406; 5 B. & Ald. 279; 9 Ad. & E. 417, 421; *Lockwood v. Wood*, 6 Q. B. 50.

(*b*) *Gateward's case*, 6 Co. 59; *Baker v. Brereman*, Cro. Car. 418; *Lockwood v. Wood*, supra.

(*c*) *Dyer*, 100; 4 Leon. 190, ca. 299; Cro. El. 35. See also *Lockwood v. Wood*, supra; *Willingale v. Maitland*, 12 Jur., N. S. 932, and the authorities there cit.

(*d*) *Att.-Gen. v. Matthias*, 4 Jur., N. S. 628.

(*e*) *Peardon v. Underhill*, 16 Q. B. 120.

(*f*) *Maxwell v. Martin*, 6 Bing. 522.

(*g*) See *Jones v. Richard*, 6 Ad. & E. 530; supra, p. 138.

SECTION II.

Who may claim by Prescription.

Natural persons and corporations.

PRESCRIPTION is commonly said to be personal, and for the most part applied to persons (*i*), and, in general, to one definite and certain person (*k*), either alone, or in *alternis vicibus* with others (*l*), or to a body corporate (*m*).

All natural persons, and all bodies politic or corporate (*n*), created before the time of legal memory or by prescription (*o*), and when so claiming a right in gross, must allege its own existence from time immemorial (*p*).

Classes of persons not incorporated.

Persons not having any perdurable estate, and forming an indefinite class, but not incorporated, and who cannot take by grant from a private person, as inhabitants or parishioners (*q*), cannot claim by prescription properly so called.

An indefinite class of persons, however, may sometimes claim by prescription. Thus for matters of privilege a prescription may be in general; for it is but a matter of exemption and personal, and is called a prescription in distinction to custom, because custom is

(*i*) Co. Litt. 118 b; *Jenkin v. Vivian*, Poph. 201; *Rowles v. Mason*, 2 Brownl. 192, 198; *Gravesend case*, Ib. 177; *Weekly v. Willman*, 1 Ld. Raym. 406, 406; *Baker v. Bearman*, W. Jones, 367.

(*k*) *Rowles v. Mason*, supra; *Miller v. Spateman*, 1 Saund. 348; Co. Comp. s. 33; *Baker v. Bearman*, supra.

(*l*) *Weiden v. Bridgewater*, Cro. El. 421.

(*m*) Co. Litt. 118 b; *Day v. Savadge*, Hob. 85; *Brickwood v. Nutt*, 3 Keb. 281; 1 Ld. Raym. 386; *Lord Sands v. Pinder*, Cro. El. 898; *Bennington v. Taylor*, 2 Lutw. 1517.

(*n*) Co. Litt. 118 b; *Day v. Savadge*, supra; *Brickwood v. Nutt*, supra; *Lord Sands v. Pinder*,

supra; *Corporation of Oxford v. Richardson*, 4 T. R. 437; 2 H. B. 182; *Mayor and Burgesses of Truro v. Reynolds*, 8 Bing. 275; *Mannall v. Fisher*, 5 C. B., N. S. 856; *Blackett v. Bradley*, 1 B. & S. 940.

(*o*) Co. Litt. 102 b; *Pitts v. Gaince*, 1 Ld. Raym. 558; *The King and Edwards v. The Bailiffs of Alborough*, 1 Keb. 308; *Att.-Gen. v. Luton Board of Health*, 2 Jur., N. S. 180.

(*p*) See *Pitts v. Gaince*, supra.

(*q*) *Gateward's case*, 6 Co. 69; *Weekly v. Willman*, 1 Ld. Raym. 406, 406; *Gravesend case*, 2 Brownl. 177; *Lockwood v. Wood*, 6 Q. B. 31; *Constable v. Nicholson*, 14 C. B., N. S. 230; *Day v. Savadge*, Hob. 85; *Rogers v. Brenton*, 10 Q. B. 86.

merely local, and this is to persons, yet having respect either to a place, as all the citizens of London (*r*), or having respect to the condition of persons, as all serjeants-at-law, or all attorneys of such a court (*s*); and such a prescription must be in generalty, to express the extent and nature of the privileges (*t*).

Although a class of persons not incorporated, as the parishioners, or inhabitants, or *probi homines* of a certain place, cannot take by that designation a grant from a private person (*u*), yet they may so take by grant from the Crown; because to the extent and for the purposes, at least, of such a grant, they will be incorporated (*x*). Such persons, therefore, would seem to be capable of claiming by prescription as against the Crown.

Class of persons taking a grant from the Crown, incorporated.

It is said to have been adjudged that the inhabitants of a town cannot be incorporated, without the consent of the major part of them, and that incorporation without that consent is void (*y*). This has been cited without remark (*z*). The context, however, in Brownlow affords no countenance to this proposition, which is entitled to little weight as authority. Claiming as a body corporate, and especially by prescription, such consent would be *prima facie* presumed.

It has been doubted whether there may not be a good *prescription* for the inhabitants of a parish to take stones from the waste for the repair of the highways (*a*). If such a prescription can be sustained, the ground would seem to be that as the waste is the property of the lord of the manor, such a right might have had a legal origin by agreement between him and them; or if, in the case before the court, the *locus in quo* was part of the

(*r*) *Day v. Savage*, Hob. 85.
 (*s*) 1 Roll. Ab. 264; 1 Ventr. 390.
 (*t*) 1 Ventr. 386.
 (*u*) Co. Litt. 3 a; Touch. 237.
 (*x*) *Dyer*, 100; 4 Leon. 190, ca. 299; Cro. El. 35; 3 Bulstr. 5. See also *Lockwood v. Wood*, 6 Q. B. 50,

63; *Willingale v. Maitland*, 12 Jur., N. S. 982, and authorities there cited.
 (*y*) 2 Brownl. 100.
 (*z*) Bac. Ab., Corporation B.
 (*a*) Per Martin, B., *Padwick v. Knight*, 7 Ex. 854.

sea shore between high water mark and low water mark, and therefore *primâ facie* in the Crown, the right might have been the subject of a grant from the Crown to the inhabitants, under which they would be capable of taking *quâ* inhabitants. The language of the plea in the case, that the *locus in quo* was contiguous to and adjoining to the sea shore or beach "between high water mark and low water mark," is not quite intelligible.

Inhabitants cannot prescribe for easement in *alieno solo*.

Although inhabitants or parishioners may perhaps claim by prescription for matter of discharge, as in *modo decimandi*, or to be quit of toll (*b*), yet they cannot so claim for an easement in *alieno solo*; and stallage, or the right of going on the land of another person and pitching their stalls there on market days, is such an easement, but if claimed by them, without paying anything for the use of the soil, cannot be by prescription (*c*).

Overseers, churchwardens, cannot prescribe.

Overseers or surveyors of highways, or overseers of the poor, or churchwardens, other than as respects churchwardens and overseers under statutory provision for special purposes (*d*), and not for any other purpose (*e*), and a parson and churchwardens who by custom, as in London, are a corporation to purchase lands (*f*), cannot take by grant, and therefore cannot claim by prescription (*g*).

A subject can against the Crown,

At common law, notwithstanding the maxim *nullum tempus occurrit regi*, a subject may acquire by prescription and usage certain rights in the freehold or inheritance of the Crown, as common way, or estovers, and also certain things, as waifs, estrays, wreck, or such

(*b*) See *Baker v. Brereman*, Cro. Car. 418; *Bree v. Chaplin*, 2 E. & Y. Tihe Ca. 270; 6 Q. B. 63.

(*c*) See *Lockwood v. Wood*, 6 Q. B. 31, 62 *et seq.*

(*d*) 9 Geo. 1, c. 7; 22 Geo. 3, c. 83; 59 Geo. 3, c. 12.

(*e*) *Woodcock v. Gibson*, 4 B. & C. 462; *Doe d. Norton v. Webster*, 12 Ad. & E. 442; *Uthwatt v. Elkins*, 13 M. & W. 772.

(*f*) Cro. Jac. 532.

(*g*) *Padwick v. Knight*, 7 Ex. 854; *Constable v. Nicholson*, 14 C. B. 230.

like, of right belonging to the Crown (*h*), and as respects those rights and others similar so acquired, the legislature has placed the Crown and also the Duke of Cornwall in the same position as subjects generally (*i*); but as respects other rights of a similar nature to those just mentioned not embraced by legislative provision, and also as respects the things also just mentioned as so belonging to the Crown, and also as respects other similar rights not so embraced belonging to the Duke, the relative position, not only of the Crown and of the subject, but of the Duke and of other subjects, remains as at common law.

As a subject may acquire by prescription rights against the Crown and against the Duke of Cornwall, so reciprocally the Crown and the duke may acquire such rights in the freehold and inheritance of the subject (*h*), and for the defence and preservation of such rights may avail themselves of the same laws as the subject (*l*). —and the Crown against a subject.

A spiritual person may prescribe for a portion of tithes in the land of another, and also *in non decimando* (*m*). Spiritual persons.

A lay person, although in general incapable of prescribing for things spiritual as appurtenant to a temporal inheritance, may, under special circumstances, prescribe to have tithes in his manor as appurtenant to it (*n*). Lay persons for spiritual things.

A person living out of a parish may claim by prescription a pew, either in an aisle, or in the nave, of the church of the parish (*o*). Pew.

Every natural person, claiming by prescription things which cannot be granted without deed and are not appendant to lands or tenements, must prescribe in him- How persons must prescribe.

(A) Plowd. 322.

(i) 2 & 3 Will. 4, cc. 71, 100.

(h) Plowd. 322.

(l) Ib. 243; 11 Co. 68.

(m) 2 Co. 44.

(n) 2 Co. 45.

(o) *Lousley v. Hayward*, 1 You. & Jer. 583.

self and in his ancestors whose heir he is, because such things cannot pass without deed (*p*); but claiming thus things which are so appendant must prescribe in himself and all those whose estate he hath, or, as it is technically called, in a *que estate* (*q*) in the lands themselves, because the lands may pass by alienation without deed (*r*), that is, by feoffment. This reason, however, is no longer strictly applicable, for, although lands may pass by feoffment still, yet a feoffment at common law, unless now evidenced by deed, is void (*s*). Every body politic or corporate, whether sole or aggregate, claiming by prescription, must prescribe in the name of such body and of its predecessors, or in a like estate (*t*).

When in a *que estate*.

A person claiming by prescription in a *que estate* must claim either as the owner in fee (*u*), or, having an interest less than the fee, in the name of the owner of the fee (*v*); and the freehold tenants of a manor must claim by prescription, and in a *que estate* (*x*); and a copyholder claiming a right in lands out of the manor must prescribe in the name of the lord (*y*).

When not.

A prescriptive obligation on a person, such as to repair fences, need not be pleaded in a *que estate*, because the party pleading does not know the title, and may therefore say that the tenants and occupiers, from time whereof, &c., have been used to make and repair fences (*z*).

(*p*) Litt. s. 188; Co. Litt. 121 a.

(*q*) Co. Litt. 121 a. See *Pad-dock v. Forrester*, 3 M. & G. 908; *Bennett v. Read*, 1 Anstr. 322, n.

(*r*) Litt. s. 183.

(*s*) 8 & 9 Vict. c. 106, s. 3.

(*t*) Co. Litt. 113 b. See *Bennington v. Taylor*, Lutw. 1517; *Lord Sands v. Pinder*, Cro. El. 898; *Blackett v. Bradley*, 1 B. & S. 940.

(*u*) Co. Litt. 113 b; Fort. 340.

See also *Ivimey v. Stocker*, 12 Jur., N. S. 419.

(*v*) *Foriston's case*, 4 Rep. 31; *Gateward's case*, 6 Ib. 59; Cro. Jac. 152, *S. C.*; *Smith v. Morris*, Fortes. 340.

(*x*) *Thompson v. Roberts*, Fortes. 339.

(*y*) *Foriston's case*, sup.; Hob. 86; Co. Litt. 121 a.

(*z*) Per Cur., *Jones v. Robins*, 10 Q. B. 620, 635.

SECTION III.

What may be claimed by Prescription.

The things which may be claimed by prescription at common law, one writer says, must be, legally speaking, of an incorporeal nature (*a*). The nature of some things however which may be so claimed is not always incorporeal, but is, as will presently appear, sometimes corporeal. Other writers say incorporeal hereditaments only (*b*). But incorporeal hereditaments are only one class of such things. Another writer says incorporeal rights alone can be so claimed (*c*). But rights, as a species of things in law, are not, as things are, divisible into corporeal and incorporeal; and if mere rights, apart from the object of them, were regarded as the subjects of prescription at common law, land, which will be hereafter shown not to be the subject of such prescription, would be the subject of it. Distinguishing a right from the object of it, things corporeal and personal, as treasure trove, waifs, estrays, wreck of the sea (*d*), which is estray on the sea coming to land, as estray of beasts is on the land coming within any privileged place (*e*), the royal fishes, whales, sturgeons, and porpoises, royal fowl, as swans (*f*), and the like (*g*), as well as things incorporeal, may be claimed by prescription.

Things incorporeal,

—and some things corporeal and personal.

The things which may be claimed by prescription at common law must have had existence before the time of legal memory (*h*), and must also be such as might be the subject of grant either from the Crown or the Duke of Cornwall (*i*), and which the Crown, without

They must have existed before time of legal memory and be grantable.

(*a*) 2 Woodd. 51.
 (*b*) 2 Com. 264; 8 Cru. Dig. 421.
 (*c*) Phear on Waters, 76.
 (*d*) Plowd. 322; Hale De Jure Maris, *passim*; 5 B. & Ald. 298; 2 Brod. & B. 403.

(*e*) 5 Rep. 108.
 (*f*) 7 Ib. 16.
 (*g*) Co. Litt. 114 b.
 (*h*) *Griffith v. Matthews*, 5 T. R. 296. See also 1 Ventr. 405.
 (*i*) Co. Litt. 114 b; 1 Rep. 16; 18 C. B., N. S. 416.

derogating from the public right, could grant (*j*); or from a private person (*k*), or of a reservation (*l*), equivalent to a grant (*m*). If not grantable they cannot be so claimed (*n*). When claimed as appendant or appurtenant, they must be of such a nature as may be so claimed (*o*), and not in gross only (*p*).

Things of profit, easements, privileges.

Things claimed by prescription at common law are commonly either things of profit, or easements or privileges (*q*), as to take a profit or benefit from or out of the lands of another person, apart from the land or soil itself, as common, and either appendant or appurtenant, of which prescription is the mother (*r*); or in gross, or to have an easement in the land of another, even from or in the land of the Crown or the Duke of Cornwall, notwithstanding the maxim *nullum tempus occurrit regi* (*s*); or by them from or in the land of a subject, or the use of water or of light; the right for the freehold tenants of a manor to dig and carry away stones for repairing their houses or for building others (*t*) may be claimed by prescription.

Toll.

The right to take toll (*u*), and as well toll-traverse, or toll for passing over the soil of a private person where the public had no right to pass before, not im-

(*j*) See *Mayor, &c. of Northampton v. Ward*, 1 Wilson, 107; *The Mayor of Nottingham v. Lambert*, Willes, 111; *Gann v. The Free Fishers of Whitstable*, 11 H. L. C. 192.

(*k*) 5 Rep. 59; Dow. 336; 1 Ventr. 387.

(*l*) See *Richards v. Bennett*, 1 B. & C. 223.

(*m*) Touch. 80; Co. Litt. 47 a; *Seymour v. Lord Courtenay*, 5 Burr. 2814; *Moore v. Earl of Plymouth*, 7 Taunt. 614; *Doe d. Douglas v. Lock*, 2 Ad. & E. 743; *Wickham v. Hawker*, 7 M. & W. 63.

(*n*) *Howel v. King*, 1 Mod. 191; *Bailey v. Stephens*, 12 C. B., N. S. 91; *Constable v. Nicholson*, 14

Ib. 230.

(*o*) Co. Litt. 121 b; *Bailey v. Stephens*, supra.

(*p*) Ib. *Ackroyd v. Smith*, 10 C. B. 164.

(*q*) *Gateward's case*, 6 Rep. 59; *Potter v. North*, Ventr. 383; *Grimstead v. Marlowe*, 4 T. R. 717; *Rex v. Churchill*, 4 B. & C. 755; 6 D. & R. 635, S. C.; *Blowett v. Tregonning*, 3 Ad. & E. 554.

(*r*) Co. Litt. 121 b.

(*s*) Plowd. 322.

(*t*) *Thompson v. Roberts*, Fortes. 339.

(*u*) *Lewis v. The Overseers of Swansea*, 5 Ell. & B. 508; *Lawrence v. Hitch*, L. R., 3 Q. B. 521.

porting a consideration, but not requiring it to be shown, because not against common right (*x*), as toll-thorough, or toll for passing over a public highway, as distinguished from a licence to use the soil of it (*y*), importing a consideration, and requiring it to be shown, because against common right (*z*), or such length of usage as will warrant its being presumed must be shown, may be claimed by prescription (*a*).

The performance of a prescriptive obligation, as to repair fences (*b*), a privilege (*c*) or discharge (*d*), or an exemption from the payment of toll (*e*).

To repair
fences.
Exemption
from toll,
—render of
tithes.

A qualified exemption or discharge of lands by *modus decimandi* from the render of tithes (*f*), or, as in the case of spiritual persons (*g*), and, in some cases of lay persons, claiming the lands of spiritual persons (*h*). An absolute discharge, *de non decimandi*, from such render may be claimed by prescription. At common law, indeed, the latter discharge could not be claimed by lay persons, because they, except in special cases, were not capable of tithes at the common law, and therefore, without special matter shown (*i*), it was not to be intended that they had any lawful discharge. And for this reason, *in favorem ecclesiæ*, lest laymen should spoil the church (*k*), or rather, as Hobart says (*l*), from an absolute and conclusive presumption of law admitting

(*x*) 3 T. R. 264.

(*y*) *Lawrence v. Hitch*, L. R., 3 Q. B. 521.

(*z*) 3 T. R. 264.

(*a*) *Lord Pelham v. Pickersgill*, 1 T. R. 660, and cases cited; 3 Ib. 264; F. N. B. 227, n. (*b*); *Richards v. Bennett*, 1 B. & C. 223; *The Mayor of Northampton v. Lambert*, Willes, 111.

(*b*) See *Holbach v. Warner*, Cro. Jac. 665; *Starr v. Roakesby*, 1 Salk. 335; *Anon.*, 1 Vent. 264.

(*c*) *Day v. Savadge*, Hob. 86; 1 Vent. 386; Co. Litt. 114 b.

(*d*) Bro. Stat. Lim. 36.

(*e*) F. N. B. 226; Bro. Stat.

Lim. 89; 4 Inst. 252; 1 H. Bl. 206; 4 T. R. 180; *Mayor, &c. of Truro v. Reynolds*, 8 Bing. 275; *Lord Middleton v. Lambert*, 1 Ad. & E. 401.

(*f*) *Bennett v. Read*, 1 Anstr. 322.

(*g*) 2 Rep. 44; *Nash v. Mollins*, 1 Leon. 241; *Bishop of Lincoln v. Comper*, ib. 248.

(*h*) 2 Com. 32; *Crouch v. Fryer*, Cro. El. 784; *Slade v. Drake*, Hob. 295; 2 Co. 44.

(*i*) 2 Co. 45.

(*k*) Ib. 44.

(*l*) Ib.

no evidence to the contrary, *præsumptione juris et de jure* (*m*), that a layman cannot be absolutely discharged of tithes, and, therefore, will not allow a prescription of such discharge; and although the discharge by grant is allowed when the grant appears, yet when it appears not, *stabitur præsumptioni donec probetur in contrarium* (*n*). Such a prescription by laymen was an exception to the principle that antiquity of time fortifies all titles, and supposeth the best beginning the law can give (*o*). The legislature has now abolished this exception, and made that principle of universal application (*p*).

The creation
of a corpora-
tion.

A corporation (*q*) may claim its creation by prescription, and may prescribe by several names, but all of them must have been used before the time of legal memory (*r*), and a mere change of name will not affect its prescriptive origin (*s*). Calling a place an ancient borough may, of itself, imply a borough by prescription (*t*).

Office.

An office of perpetual subsistence, and also land, as an accessory to such an office, may be claimed by prescription (*u*). But, perhaps, in England only; for, in Ireland, the dominion of the king of England over it commenced much within the time of legal memory (*x*).

Franchise of
portum maris.

The franchise of *portum maris*, and also land as an incident thereto, may be claimed by prescription; for in ordinary presumption, the claimant of such a franchise has not only the franchise itself, but the very water and soil within the port (*y*).

(*m*) Best, Prin. Ev. ss. 43, 306.

(*n*) Hob. 297.

(*o*) *Ib.*

(*p*) 2 & 3 Will. 4, c. 100.

(*q*) 10 Co. 29 b; 2 Inst. 330; 5 El. & B. 508; Co. Litt. 114 a, b, 122 a, 144 a. See also authorities cited n. (*n*), Chap. II. Sect. II. of this Book.

(*r*) Per Hale, Hardr. 504.

(*s*) 4 Rep. 87 b.

(*t*) Per Tindal, C. J., *The*

Mayor, &c. of Truro v. Reynolds, Bing. 275, 281.

(*u*) See Plowd. 169; W. Jo. 281; Co. Litt. 114 b, 121 b, 122 a; *Scambler v. Waters*, Cro. El. 636; *Bishop of Salisbury's case*, 10 Rep. 58 b; Cro. Jac. 605.

(*x*) Per Lord Manners, C., *Ex parte F. Shaw*, Beatty, 24, 34.

(*y*) Hale, De Jure Maris, pt. i. c. vi. 33, pt. ii. cc. iii., iv., v.

A chancel, or an aisle, or a pew, either in an aisle, Chancel, aisle, or in the nave of a church, may be claimed by prescription (z). pew.

A claim to burial in a particular vault is for an easement, and not an interest in land, and therefore must be created by deed (a); and although a parson cannot create such an easement, yet it seems it may be claimed by prescription. A man may prescribe that he is tenant of an ancient messuage, and ought to have separate burial in such a vault within the church (b); and although such a right cannot be created by grant, yet may be by a faculty, which is, for such purpose, equivalent to a grant, and, as in the case of a pew (c), may, in support of the claim, be presupposed (d). Right of sepulture.

A prescription for *separalem pasturam* (e), or for *separalem solam vesturam terræ* from such a day to such a day (f), and either by a commoner against the lord, or by one commoner against another (g), is good, and will exclude the owner of the soil from such part, but not from all the profit, for he shall have the mines, trees, &c. (h). *Separalem pasturam. Solam vesturam terræ.*

A prescription for the sole and exclusive right of pasture and feeding for some commonable beasts, will not exclude the owner of the soil from pasturing and feeding his commonable beasts of another kind (i), for the presupposed grant would be thus interpreted (k); as in the case of an express grant to dig for ore in the lands of the grantor, although creating in the grantee an interest When exclusive of the owner of the soil.

(z) See *Churton v. Frewen*, 12 Jur., N. S. 879, and cases cited.

(a) *Bryan v. Whistler*, 8 B. & C. 288.

(b) Com. Dig. Cemetery, B.

(c) See *Griffith v. Matthews*, 5 T. R. 296.

(d) *Bryan v. Whistler*.

(e) See Co. Litt. 122 a; *North v. Coe*, Vaugh. 255; *Potter v.*

North, 1 Vent. 388; *Welcome v. Upton*, 5 M. & W. 398.

(f) Co. Litt. 122 a.

(g) *North v. Coe*.

(h) Co. Litt. 4 b; *Potter v. North*.

(i) *Jones v. Richards*, 6 Ad. & E. 530.

(k) *Ib.*; Co. Litt. 122 a.

and inheritance, does not exclude the grantor from digging also(*l*).

Common in
alieno solo.

A prescription for any manner of common *in alieno solo*, to the entire exclusion of the owner of the land, is bad in law(*m*); for it is against the nature of the word common, and it was implied in the first grant that the owner of the soil should take his reasonable profit there(*n*). But in the case of a commoner prescribing to exclude the lord, the reason is said not to be upon any argument from the word common, but from the nature of the thing(*o*).

Common
causâ vicini-
nagii.

Common or, as it is sometimes called, feeding(*p*), *per cause de vicinage*, or *causâ vicinagii*(*q*), or *ratione vicinagii*(*r*), arises where the tenants of two adjoining manors have immemorially intercommoned with each other with all manner of beasts commonable(*s*), but is not strictly and properly a right of common or *profit à prendre*, but merely an excuse for a trespass(*t*).

Where such common exists, commoners on both sides are most frequently found, but are not necessary in order to give validity to the claim(*u*). The claim may be by the owners of two adjoining farms held by them in severalty, and may be claimed by prescription(*v*), and, as they were competent to have created the usage by grant(*x*), has its origin from a presumed mutual

(*l*) Godb. 17; 1 And. 307; Co. Litt. 164 b.

(*m*) *Potter v. North*, 1 Vent. 383.

(*n*) Co. Litt. 122 a.

(*o*) See *Potter v. North*, 1 Vent. 383, 395.

(*p*) *Corbet's case*, 7 Rep. 5 a.

(*q*) Rast. Ent. Tresp. 625 b, n.; 10 Q. B. 623.

(*r*) 3 Keb. 388.

(*s*) *Termes de la Ley*, Common, Co. Litt. 122 a.

(*t*) *Tyrringham's case*, 4 Rep. 36 b, 88 b, 39 a; *Corbet's case*, supra; Co. Litt. 122 a; *Brom-*

field v. Kirber, 11 Mod. 72; 4 B. & C. 754; *Wells v. Pearcy*, 1 Bing. N. C. 556; *Jones v. Robin*, 10 Q. B. 581; *Ib.* 620, in error; *Prichard v. Powell*, *ib.* 589; *Clarke v. Tinker*, *ib.* 604; *Heath v. Elliott*, 4 Bing. N. C. 388.

(*u*) *Jones v. Robin*, supra.

(*v*) *Jenkin v. Vivian*, Poph. 201; *Jones v. Robin*, supra; *Prichard v. Powell*, supra; *Clarke v. Tinker*, supra.

(*x*) Bro. Ab., Prescription, pl. 71; *Jones v. Robin*, supra.

grant or covenant between such owners that neither of them or their tenants should sue the other or his tenants, or distrain, or perhaps even drive their cattle away, so long as the farms should be open to each other, and is not a simple prescriptive obligation not to sue for trespasses or distrain cattle on one side, but a mutual obligation on both. The obligation of one owner is the consideration for that of another(*y*); "it ought to be pleaded mutual"(*z*); is releasable like any other private right, and, where it is not a manorial custom, ought to be prescribed for in a *que estate*(*a*).

The real principle of the claim is mutual acquiescence, and there must be not only an absence of fence, but an immemorial allowance of the straying of the cattle(*b*). The claim depends only on the cattle being in the place they escape from. Since the 2 & 3 Will. 4, c. 71, it is immaterial whether they were there by immemorial right or not. That statute affects the evidence of the right and not the right itself(*c*). All that is necessary to be shown is, that the cattle were lawfully on their own common before they strayed; and that is done by showing thirty years' user under the statute. Before the statute it must have been shown that they were there using a prescriptive or customary right of common or by leave of the lord, but since the statute it is otherwise(*d*).

Principle of the claim.

If the cattle straying have been constantly turned back(*e*), or the owner of the lands in which the right is claimed has had exclusive possession of them(*f*), the claim cannot be sustained.

When not sustainable.

(*y*) 4 Rep. 38 b.
(*z*) *Bromfield v. Kirber*, 11 Mod. 73.

(*a*) *Jones v. Robin*, 10 Q. B. 620.

(*b*) *Jones v. Robin*, 10 Q. B. 581; *Ib.* 620, in error; *Clarke v. Tinker*, *Ib.* 604.

(*c*) 10 Q. B. 600.

(*d*) *Prichard v. Powell*, 10 Q. B. 589.

(*e*) *Clarke v. Tinker*, 10 Q. B. 604; *Heath v. Elliott*, 4 Bing. N. C. 388.

(*f*) *Heath v. Elliott*.

Determinable by inclosure. This claim may be determined by inclosure (*g*), but the inclosure must be complete or the claim is not extinguished (*h*), and notice of the extinguishment must be given to the commoners of the uninclosed common (*i*).

Sheepwalk. A sheepwalk, "sheepcoate or sheep-pend," *ovile*, does not contain the soil, but is in the nature of a common (*k*), and therefore may be claimed by prescription.

Mode of holding lands. The mode of holding land, as in common, with others (*l*), but not in joint tenancy (*m*), or of enjoying a *profit à prendre* in different parcels of a certain number of acres of land, at different times, *in alternis vicibus*, with other persons (*n*), may be claimed by prescription.

Fisheries. As fisheries, especially sea-fisheries, are a prolific and almost an indefinite source of subsistence; and as the cultivation and preservation of fish have been, of late years, both on economic and on industrial and commercial grounds, the objects of numerous legislative provisions, and as fisheries may be (*o*), and frequently are, claimed by prescription, they are here considered at some length.

A fishery, in the old books commonly called piscary, may be claimed by prescription (*p*).

What the term fishery comprises. The term fishery comprises both the right of fishing or of taking fish, *jus piscationis*, and the place where the right is exercised, or where the fish is taken, *piscaria*, is employed to denote both the right and the place together or either of them separately, is not a technical term in the law of Scotland, but is used to comprehend every right of fishing whatever which a

(*g*) Co. Litt. 122 a.
 (*h*) *Gullitt v. Lopes*, 13 East, 348.
 (*i*) *Wells v. Pearcy*, 1 Bing. N. C. 556.
 (*k*) *Huddleston v. Woodroffe*, 2 Rolle's Rep. 61.

(*l*) Litt. a. 310.
 (*m*) Co. Litt. 195 b.
 (*n*) *Weldon v. Bridgewater*, Cro. El. 421.
 (*o*) Com. Dig., Piscary, A.
 (*p*) *Ib.*

man can vindicate and enforce as a matter of territorial right, and, when used alone, is not, either there or in England, restricted to any particular species of fish (*r*). In ancient charters and deeds the right and the place are commonly distinguished, and the right is denoted by *piscatio*, the place by *piscaria* (*s*). *Piscatio* sometimes denotes the act of fishing (*t*). Each of these terms however is sometimes used synonymously with the other (*u*).

A fishery, *jus piscationis*, is either the natural right Fishery, what. of the owner of the soil covered with the water in which the right is exercised, and of such water, as a consequence of or an incident to such ownership (*x*), or the liberty of another person to fish in such water (*y*); and where the water flows between the lands of different owners, the *jus piscationis ad medium filum aquæ*, belongs to the owner of the land on each side the water, and as well where the water is in a navigable river (*z*) as in a private river, and in the latter case as a right in his own land, and not as an easement *in alieno solo* (*a*), and not to the lord of the manor through which the water flows. And this right is not altered by the

(*r*) See 44 Geo. 3, c. 45; *Henderson v. Johnstone*, 1 Court Sess. Ca., 3rd series, 128.

(*s*) See *The Royal Fishery of the Banne*, Dav. 55; 5 Dug. Mon. 672; 7 Ib. 907; *Calmady v. Rowe*, 6 C. B. 861, 872; *Menzies v. Macdonald*, 2 Macq. 463; 16 Court Sess. Ca., 2nd series, 827; *Commissioners of Woods and Forests v. Gammell*, 13 Ib. 854, 874, 875; 2 Ib., 3rd series, 908; Du Cange, 503.

(*t*) Hale, De Jure Maris, 21.

(*u*) Spel. Gloss. 460; Du Cange, 503; 12 Rym. Foed. 826, 839; Co. Litt. 4 b, 122 a; Kelham's Domesday Book, 295; Hale, De Jure Maris, 5, 21, 33, 55.

(*x*) 18 Hen. 6, 29; Termes de la

Ley, Piscary; 5 B. & C. 883; 2 L. R., E. & I. A. C. 165; 5 Court Sess. Ca., 3rd series, 699; 7 Ib. 142.

(*y*) Com. Dig., Piscary, A.; Hale, De Jure Maris, cap. 1; Co. Litt. 4 b; Sav. 14; *The Royal Fishery of the Banne*, Dav. 55; *Scrutton v. Brown*, 4 B. & C. 485; *The Duke of Somerset v. Fogwell*, 5 Ib. 875.

(*z*) *Gray v. Bond*, 2 Brod. & B. 667.

(*a*) Hale, De Jure Maris, cap. i.; 8 Ir. C. L. R. 291; *Lamb v. Newbiggin*, 1 Car. & K. 549. See also *Patrick v. Napier*, 5 Court Sess. Ca., 3rd series, 683, 699; *Wedderburn v. Paterson*, 2 Ib. 902; 16 W. R. 595.

river changing its state by the formation of a bank in the centre (*b*). And inasmuch as the river is not divided by any abutments, marking the respective rights of the parties, and as the fish run freely from one side to the other, this right of fishery is, in its very nature, a species of tenancy in common; and the mere exercise of such right of fishery in a particular mode by one of them in the whole river will not, from mere lapse of time, exclude the right of the other. But if one of them erect abutments in the middle of the river, or by any other act entirely destroy and put an end to the enjoyment in common, that may amount to an ouster, and exclude the right of the other (*c*).

May be independent of the ownership of the soil,

This *jus piscationis ad medium flum aquæ* however may belong to the proprietors of the lands on each side of the stream, not as an incident of their ownership of, either such lands, or the *alveus* of the stream, but as a right independent of such ownership, and the soil of the stream may belong to a third person, as in the case of different proprietors of lands on each side of a navigable tidal river, where, *primâ facie*, the soil of the river is in the Crown (*d*), and the *jus piscationis* may be in either such proprietors (*e*), or the Crown itself (*f*), or a third person.

—or an incident of such ownership, and for only some fish.

The owner of the banks of a stream may have, as an incident of his ownership, a right to take not all, but only a particular species of, fish in the stream, and must then so exercise the right as not to injure the fishing for any other species of fish belonging to any other proprietor (*g*).

(*b*) *Wedderburn v. Paterson*, 2 Court Sess. Ca., 3rd series, 902; *Earl of Zetland v. Glover Incorporation of Perth*, 6 Ib. 292.

(*c*) See *Beauman v. Kinsella*, 8 Ir. C. L. R. 291.

(*d*) Hale, *De Jure Maris*, pt. i.

(*e*) *Gray v. Bond*, 2 Brod. & Bing. 667; *Wedderburn v. Paterson*, 2 Court Sess. Ca., 3rd series, 902.

(*f*) *The Banne Fishery case*, Dav. 55 b.

(*g*) See *Mackenzie v. Rose*, 8 Court Sess. Ca., 1st series, 816.

A fishery, *jus piscationis* (*h*), especially a public common fishery (*i*), is in or on the water, and the water, either when stagnant on, or when flowing from, one part to another of the land of the same owner, is the exclusive property of such owner (*j*), yet when flowing into or over the lands of different proprietors is not, in itself in regard to its integral parts, capable of exclusive proprietorship, but is then by nature their common property (*k*); and they have, at least, an interest which, although it may not be styled property, yet as nearly as the subject admits amounts to property, and more than the right of user, and may give to them rights, *quoad* the public, equivalent to the right of property, or even such right itself (*l*); and when the stream is on the surface, and not merely subterranean (*m*), they have amongst themselves the use, but so far only as not to work any material injury to the other proprietors above or below on the stream (*n*).

The ownership of the water.

Conterminous proprietors of fishings in a navigable tidal river, or in the waters of a private stream, without the ownership of the soil of the *alveus* of such river or stream, but owners or not owners of the lands on each side of such river or stream, have more community of interest, though not of property, than proprietors of land adjoining such river or stream on each side (*o*).

Community of interest and property of conterminous owners of fishings.

As between the proprietors of two sole and separate salmon fisheries in the same river, one below the other, both acquired by grant from the Crown, the proprietor

Mutual rights of owners of two fisheries, one below the other.

(*h*) Co. Litt. 4 b.

(*i*) See *Blundell v. Catterall*, 5 B. & Ald. 268, 301.

(*j*) See *Fergusson v. Shirreff*, 6 Court Sess. Ca., 2nd series, 1363.

(*k*) 2 Court Sess. Ca., 3rd series, 1082, 1087, 1090.

(*l*) *Fergusson v. Shirreff*, 6 Court Sess. Ca., 2nd series, 1363.

(*m*) *Acton v. Blundell*, 12 M. & W. 324.

(*n*) *Hamilton v. The Marquis of Donegal*, 3 Ridgw. P. C. 267;

Wright v. Howard, 1 Sim. & S. 190; *Mason v. Hill*, 3 B. & Ad. 804; 5 Ib. 1; *Wood v. Waud*, 3 Ex. 748; *Embrey v. Owen*, 6 Ib. 353; *Sampson v. Hodinott*, 1 C. B., N. S. 590; *Miner v. Gilmour*, 12 Moo. P. C. C. 131; *Nuttall v. Bracewell*, 15 L. T. R., N. S. 313; *Crossley v. Lightowler*, L. R., 3 Eq. Ca. 279; Ib. 156.

(*o*) See *Wedderburn v. Paterson*, 2 Court Sess. Ca., 3rd series, 902.

of the upper fishery has a right to the full possession of the water, the element of his fishery, in the same state, plight and condition in which it was enjoyed when the grant was obtained. He has a right to a free passage for fish from the sea into his fishery, and he has a right to catch as many fish as he can catch, by industry and art, which find their way into his fishery. The proprietor of the lower fishery has the same rights, a right to the same full possession of the water, to a free passage for fish from the sea into his fishery, a right abstractedly to catch every fish which finds its way into his fishery, which he can seize by his art or by his industry. But in the exercise of this right he cannot alter the state, plight or condition of the water of the upper fishery, from the state, plight and condition in which it was enjoyed when granted by the Crown, to the injury of such upper fishery. Nor can he stop or obstruct the passage of fish from the sea into such fishery, in any manner not essentially necessary to enable him to exercise his right of catching fish in their passage up the river (*p*).

Ownership of a fishery follows that of the river.

The allegation of the ownership of a river is *prima facie* an allegation of the ownership of the fishery therein (*q*), and where land is held in severalty the right of fishery is also to be taken as so held (*r*).

Fishery is an interest, an hereditament, and incorporeal.

A fishery, whether a public common fishery (*s*), or a private one, is an interest, and not a mere easement (*t*), is clearly a hereditament (*u*), and, without any distinction as to being several, free or common, has been treated (*x*) as a thing incorporeal, which may be append-

(*p*) *Hamilton v. Marquis of Donegal*, 8 Ridgw. P. C. 267; *Weld v. Hornby*, 7 East, 195.

(*q*) See *Rex v. Green*, Cald. 391.

(*r*) *Snape v. Dobbs*, 8 J. B. Moore, 23.

(*s*) *Ashmorth v. Browne*, 10 Ir. C. R. 421, 488.

(*t*) *Hardr.* 407; *Herbert v.*

Laughlwyn, Cro. Car. 492; *Hale*, De Jure Maris, 32; *Wickham v. Hawker*, 7 M. & W. 63, 79; *Bland v. Lipscombe*, 4 El. & B. 713, n.

(*u*) *Cooper v. Phibbs*, 2 L. R., E. & I. A. C. 149.

(*x*) *Hill v. Grange*, Plowd. 170.

ant or appurtenant to a thing corporeal; and even when several has been considered of that nature (*y*), and may be appurtenant to a manor (*z*), that is, *in rei veritate*, to the demesnes or lands of the manor (*a*), of which it principally consists (*b*); and such a fishery, when in a navigable river, may be appurtenant to lands adjoining the river, although not demesne lands (*c*).

A fishery, comprising both land and the *jus piscationis*, the soil may be in one person and the *jus piscationis* may be either in another person (*d*), or common to all persons, as in a public common fishery in a navigable river (*e*), and therefore lies not in tenure, and the lord cannot distrain (*f*).

The soil and the *jus piscationis* may be in different persons.

A fishery, *jus piscationis*, cannot be recovered by ejectment, because only a *profit à prendre* (*g*), for possession of it cannot be delivered (*h*). In the case of *Rex v. Old Alresford* (*i*), Ashhurst, J., said a fishery may be recovered in ejectment. But there the fishery and the soil, that is, a several fishery, were presumed to have passed together, and even then the ejectment would be for the land, *aqua cooperta*, and not the fishery merely (*k*). A tenant in common of a piscary may have an action of waste against his companion (*l*).

Fishery not recoverable in ejectment.

A fishery will pass by a conveyance of the land ad-

When it passes

(*y*) See *Hayes v. Bridges*, Ir. T. R. 390; per Pigot, C. B., *Little v. Wingfield*, 11 Ir. C. L. R. 68, 103.

(*z*) *Rogers v. Allen*, 1 Campb. 309. See also *Vivian v. Blake*, 11 East, 268; *Blundell v. Catterall*, 5 B. & Ald. 268; *Gray v. Bond*, 2 Brod. & B. 667.

(*a*) Co. Litt. 122 a.

(*b*) Plowd. 168, 170; Co. Cop. s. 81.

(*c*) *Hayes v. Bridges*, Ir. T. R. 390.

(*d*) *Lord Fitzwalter's case*, 1 Mod. 105; *Lord Paget v. Milles*, 3 Doug. 43; *Seratt v. Brown*, 4 B. & C. 485; *Gray v. Bond*, 2

Brod. & B. 667; *Holford v. Bailey*, 8 Q. B. 1000; 18 Ib. 426.

(*e*) *Lord Fitzwalter's case*.

(*f*) Fitz. Sci. Fa. 100; Bro. Ab. Tenures, pl. 75; 20 Vin. Ab. 201, pl. 4.

(*g*) *Molineux v. Molineux*, Cro. Jac. 144, 146; *Herbert v. Laughlwynn*, Cro. Car. 492. See also *Irish Society v. Crommelin*, Ir. Rep., 2 C. L. 324.

(*h*) *Challenor v. Thomas*, Yelv. 143.

(*i*) 1 T. R. 358.

(*k*) 8 Q. B. 1013. See also *Irish Society v. Crommelin*, Ir. Rep., 2 C. L. 324.

(*l*) Co. Litt. 200 b.

by a conveyance of the land.

joining a private river or other stream, because of common right it might be incident to the soil, but not necessarily by a conveyance of land adjoining a navigable tidal river, or an arm of the sea, or *districtus maris*, because by common right, unless a particular person have acquired either by grant or by prescription the exclusive right of fishing, all persons have a right to fish there (*m*); and even if the owner of the land in the latter case were also the owner of the soil adjoining thereto between high and low water mark, the right of fishing would not be, as in the former case, an incident to the soil, but exist as a distinct privilege, and would not pass by a conveyance of such soil, but only by the term fishery (*n*).

When a lease gives no right to the lessee to angle for trout.

In a recent case in *Scotland* (*o*), an agricultural tenant holding under a lease reserving to the lessor the game, but silent as to fishings, was held to have no right at common law to angle for trout in a pond stocked with fish by the lessor, through which flowed a small burn, the boundary between the farm leased and another farm of the lessor. And the use of the water by the tenant for the purposes of his farm was held to be consistent, and might subsist with, and could not affect, the separate and distinct right of trout-fishing in the pond. The general question whether, by the common law of Scotland, such a lessee, without special provision in his lease, would be entitled to fish for trout in a running stream passing through his farm, was raised and discussed, and the Lord Justice Clerk and Lord Neaves considered that there is no such right; that the right of trout-fishing in private streams, or in ponds or locks, is an accessory to the right of property in the lands adjoining and vested in the owner of the lands, and capable of forming the subject of a separate contract of lease,

(*m*) *Scrutton v. Brown*, 4 B. & C. 485; Hale, *De Jure Maris*, pt. i. cc. iv., v.

(*n*) *Ib.*
(*o*) *Maxwell v. Copland*, 7 Court Sess. Ca., 3rd series, 142.

and may constitute a valuable right in itself; and that a lease of the lands themselves alone does not give to the lessee any such right. The latter judge also said that the right is not a public one, exerciseable by all who may have access to the water, but is a privilege of the proprietor of the soil, excluding strangers from taking the trout, and that there is no property in the trout in, any more than in the water of, the burn.

The right of landing nets, or of driving stakes into the soil for affixing them thereto, is sometimes claimed as necessary to the right of fishing, and, when so necessary, would pass as an incident. There are however many instances of rights of fishery being exercised without the right of landing nets, or of driving stakes, such as the fisheries in the Thames, the Southampton and other rivers, which are carried on by means of boats alone for that purpose; therefore these rights are not necessarily incident to the right of fishing, even in navigable rivers (*q*).

Right of landing nets when an incident to a fishery.

In *Shuttleworth v. Le Fleming* (*r*), the right of landing nets on the land of the plaintiff was claimed as an incident to the free fishery claimed by the defendant, and it was argued that such right, as well as the fishery, being incorporeal, could not be so claimed. The right, however, if an incident necessary to the exercise of the right of fishing, would be so claimable (*s*). On the trial of the case the jury negatived the right. The case before the court however did not require a decision of the point, and only decided that the fishery, being in gross, the claim to it could not be sustained under the Prescription Act, 2 & 3 Will. 4, c. 71.

A grant of salmon fishing in Scotland implies a right of drawing nets on both sides of the river, a right of

(*q*) See *The King v. Ellis*, 1 M. & S. 652, 666; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

(*r*) 19 C. B., N. S. 687.

(*s*) *Hayes v. Bridges*, Ir. T. R. 390; *The King v. Ellis*, 1 M. & S. 652.

access to the banks, but the right must be exercised in the least oppressive manner (*t*).

Exercise of the right as evidence of ownership of the soil.

The exercise of the right of landing nets, and of driving stakes into the soil for affixing to them the nets, may afford evidence of the ownership of the soil (*u*), and such exercise for twenty years will warrant a direction to a jury to presume a grant of them from the owner of the soil to the owner of a several fishery in a navigable river, lord of a manor who claimed such fishery as appurtenant thereto (*x*).

Right to dry nets on adjoining land.

In *The Heirs of Sir Roger Lewknor and Ford's case* (*y*), Anderson, C. J., said, "if one hath a piscarie in the land of another man, the land adjoining is, as it were, a servant, viz., to drie the nets." This however is a mere dictum, and is, at least, questionable. But such a right, when it does not involve digging in the land and pitching stakes for drying the nets, may be claimed by custom (*z*).

Two classes of fisheries:
I. Private.
II. Public.

A fishery, regarded simply as to the persons using it, is either a right, accompanied, in a greater or less degree, with property, and vested in either a person, or in a limited number of persons, as a private right; or is a public privilege exerciseable by, and common to, either all persons, or some class or classes of the public, usually designated a common fishery, and, apart from its public nature, distinguishable from a private common of fishery (*a*).

I. A private fishery is either a several fishery, a free fishery, or a common of fishery (*b*), and may be either appendant or appurtenant or in gross (*c*).

(*t*) *Miller v. Blair*, 4 Court Sess. Ca., 1st series, 214; *Forbes v. Earl of Kintore*, Ib. 650.

(*u*) *The King v. Ellis*, 1 M. & S. 652.

(*x*) *Gray v. Bond*, 2 Brod. & B. 667.

(*y*) Godb. 114, 117.

(*z*) 8 Edw. 4, 18, 19; Hale, De Jure Maris, pt. 2, c. vii.; 5 B. &

Ald. 296, 297.

(*a*) *Bennett v. Costar*, 8 Taunt. 183.

(*b*) *Seymour v. Lord Courtenay*, 5 Burr. 2814.

(*c*) Co. Litt. 121 b, 122 a; F. N. B. 179 d; Plowd. 164; *Hayes v. Bridges*, Ir. T. R. 390; *Rogers v. Allen*, 1 Campb. 309.

Private fisheries are commonly thus distinguished. But in so distinguishing them, and, as respects at least two kinds, on the meaning and the application of the terms employed in the distinction, much confusion, and, as a consequence, much discussion have arisen in England, whilst in Scotland no corresponding, or indeed no such, distinction exists, and thus that confusion and its consequence have been avoided (*d*).

A several fishery, as an incident to the ownership of the soil, has been sometimes called predial or territorial, and, when not so incident and strictly defined, as an exclusive right of fishing *in alieno solo* (*e*). In old deeds it is sometimes designated a "free fishery" (*f*). A several fishery, whether as an incident to, or apart from, such ownership, has also been said to be the exclusive right of only *one* person (*g*). A free fishery is defined by Blackstone (*h*) as an exclusive right of fishing in a public river (*i*) and a royal franchise, and adds that some have considered such a fishery, not as a royal franchise, but merely as a private grant of a liberty to fish in the several fishery of the grantor, and cites *Siderfin* (*j*). Admitting, however, that in either case the fishery is to be designated a free fishery (*k*), disregarding the place where the right is exercised, and the person from whom it is derived, and attending to only the nature of the right in each of these cases as exclusive, a free fishery, according to this definition, is really a several one. A free fishery has been also defined as where "several *specified* persons have equal rights of

Effect of distinction of private fisheries.

How a several fishery is distinguished from a free one.

(*d*) See *Henderson v. Johnston*, 1 Court Sess. Ca., 3rd series, 128.

(*e*) Chitty on the Game Laws, 283.

(*f*) See *Lamb v. Newbiggin*, 1 Car. & K. 549.

(*g*) Phear on Rights of Water, 63, 64.

(*h*) 2 Com. 89.

(*i*) See *Gray v. Bond*, 2 Brod. & B. 667.

(*j*) 2 Sid. 8. See also 8 Ir. C. L. R. 279, 288; 11 Ib. 63, 96, 104.

(*k*) See also Com. Dig., Prærogative D, 50; *Carter v. Murcot*, 4 Burr. 2162.

fishing in the same waters" (*l*). A several fishery, however, may belong to more than one person and yet be several or exclusive as to all other persons (*m*), and a free fishery may belong to only one person, as where the owner of a several fishery grants *liberam piscariam* to another. A free fishery also is admitted to be an exclusive right (*n*), and therefore is so far a several one as being also a right exclusive. With reference indeed to the real nature of these two kinds of fisheries, the number of persons claiming them, and, as respects the free fishery, the place in which it is claimed, are merely accidental and not essential.

In the course of the argument in the case of *Shuttleworth v. Le Fleming* (*o*), Willes, J., is reported to have said, "When common of fishery is described, it is usually called *free*, by reason of everybody having a right to go there;" and in the judgment of the House of Lords, delivered by him in the case of *Malcomson v. O'Dea* (*p*), is reported as having said that a right in common with others is usually called "common of fishery," sometimes "free," used as in free port. But the reason assigned is not applicable to a common of fishery, but only to a common fishery, and they are sometimes confounded (*q*). He had previously said in the same case (*r*) "free fishery *primâ facie* means several fishery."

All private fisheries are several;

All private fisheries, considered as respects the owners of them, on the one hand, and strangers on the other hand, are several in their nature; for a several fishery is the right to fish exclusive of all other persons in a

(*l*) Phear on Rights of Water, 64.

(*m*) See *Seymour v. Lord Courtenay*, 5 Burr. 2814.

(*n*) 2 Com. 89.

(*o*) 19 C. B., N. S. 687, 700.

(*p*) 10 H. L. C. 593.

(*q*) *Bennett v. Cogter*, 8 Taunt. 183.

(*r*) 19 C. B., N. S. 697.

particular place, either with or without the soil (*s*), and a free fishery and a common of fishery, although belonging to several persons, are rights to fish exclusive of all other persons in particular places, and, therefore, several fisheries; and a free fishery, defined as the exclusive right of fishing in a public river (*t*), is sufficiently described as a several fishery (*u*). Considered, however, as respects the owner or owners alone, but rejecting the distinctions having reference to such owner or owners, either individually or collectively as a class or classes, and to the place where the *jus piscationis* is exercised, the several species of private fishery will be defined and considered *seriatim* under the distinctive names already given, by which they are commonly denoted.

—but considered as usually distinguished.

A several fishery, *separalis piscaria* (*x*), is the first kind of private fishery, and is either the natural right of the owner of land, as an incident of such ownership (*y*), exclusive of all other persons, or the right of another person without any interest in but derived from the owner of the land (*z*), exclusive of the owner of the soil (*a*) and of all other persons (*b*) in a particular

1. A several fishery, what.

(*s*) *Holford v. Bailey*, 13 Q. B. 426, 446; *Malcomson v. O'Dea*, 10 H. L. C. 593, 619.

(*t*) 2 Com. 39.

(*u*) *Malcomson v. O'Dea*, *supra*.

(*x*) Co. Litt. 4 b, 122 a; 13 Q. B. 446; 19 C. B., N. S. 700.

(*y*) 18 Hen. 6, 29; 17 Edw. 4, 6; Hale, *De Jure Maris*, 1, 18, 19, 20; *The Banne Fishery*, Dav. 55; *Child v. Greenhill*, Cro. Car. 553; *Carter v. Murcot*, 4 Burr. 2162; *Smith v. Kemp*, Holt, 322; *Seymour v. Lord Courtenay*, 5 Burr. 2814; *The King v. Ellis*, 1 M. & S. 652; *The Duke of Somerset v. Fbgrell*, 5 B. & C. 886; *Scrutton v. Brown*, 4 B. & C. 485; *Calmady v. Rowe*, 6 C. B. 861; *Malcomson v. O'Dea*, 10 H. L. C. 593; *Gann v. The Free Fishers of Whitstable*, 11 Ib. 193; *Holford v. Bailey*, 8 Q. B. 1000; 13 Ib. 426, on error; *Marshall v. The*

Ulleswater Steam Navigation Co., 3 B. & S. 732; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; *Wenman v. Mackenzie*, 5 Ell. & B. 447; *Beauman v. Kinsella*, 8 Ir. C. L. R. 291; *Rastorne v. Backhouse*, 3 L. R., C. P. 67; *Maxwell v. Copland*, 7 Court of Sess. Ca. 3rd ser. 142.

(*z*) Co. Litt. 4 b; *The Royal Fishery of the Banne*, *supra*; *Seymour v. Lord Courtenay*, 5 Burr. 2814; *Hayes v. Bridges*, Ir. T. R. 390; *The Duke of Somerset v. Fbgrell*, *supra*; *Holford v. Bailey*, 8 Q. B. 1000. See also *Marshall v. The Ulleswater Steam Navigation Co.*, 3 B. & S. 732.

(*a*) Co. Litt. 4 b, 122 a.

(*b*) Co. Litt. 4 b, 122 a; *Seymour v. Lord Courtenay*, 5 Burr. 2814; *Holford v. Bailey*, *supra*; 13 Ib. 426; 8 Ir. C. L. R. 295.

place (c), and either for all, or for all of a particular kind of fish (d); and such a fishery, enjoyed to the exclusion of others, and dealt with as of right, as a distinct and separate property, is sufficiently described as a several fishery (e); and even the description of it as a "sole and exclusive fishery," although doubtful on special demurrer, cannot be objected to after verdict (f). And a weir, by long enjoyment of it with such a fishery, may be claimed as appurtenant to it (g).

May be in separate parts of the same water, and in separate owners.

A several fishery may exist in separate parts of the same water, and in each part may belong to a different person (h); and such a fishery, whether an incident to the ownership of the soil, or *in alieno solo*, may belong to several persons (i), and as to all other persons will still remain a several fishery. Even if such several persons have the fishery as tenants in common, it does not become a common of fishery, and each of them must exercise his right of fishing with a due regard to the same right of each of the others. But if the owner of a several fishery grant to several persons separate and coextensive rights of fishing, each of such persons has what is commonly designated a free fishery (k), but without excluding the owner (l). And although such persons have coextensive rights of the same kind, they

(c) *Ib.* 46; *Hale, De Jure Maris*, 1; *The Royal Fishery of the Banne*, *Dav.* 55; *Holford v. Bailey*, 8 Q. B. 1000; 13 *Ib.* 426; 10 H. L. C. 619.

(d) *Per Rookby, J., Gipps v. Wollicott*, *Comb.* 484; *The Banne Fishery*, *Dav.* 55; *Seymour v. Lord Courtenay*, 5 *Burr.* 2814; *Holford v. Bailey*, 13 Q. B. 436; *Bridges v. Highton*, 11 L. T., N. S. 653; *Malcomson v. O'Dea*, 10 H. L. C. 593.

(e) See *Malcomson v. O'Dea*, 10 H. L. C. 593.

(f) *Holford v. Bailey*, 13 Q. B. 426, on error, reversing the decision of the Q. B. See also *Hayes v. Bridges*, *Ir. T. R.* 390.

(g) *Williams v. Wilcox*, 8 *Ad. & E.* 314; *Little v. Wingfield*, 11 *Ir. C. L. R.* 63; *Rolle v. White*, 17 L. T. R., N. S. 560.

(h) *Hamilton v. The Marquis of Donegal*, 8 *Ridgw. P. C.* 267; *Lamb v. Newbiggin*, 1 *Car. & K.* 549.

(i) See *Seymour v. Lord Courtenay*, 5 *Burr.* 2814; *Gann v. The Free Fishers of Whitstable*, 11 C. B., N. S. 387; 13 *Ib.* 853; 11 H. L. C. 192.

(k) *Alderman de Londres v. Hastings*, 2 *Sid.* 8; *Seymour v. Lord Courtenay*; see also *Little v. Wingfield*, 8 *Ir. C. L. R.* 279, 288; 11 *Ib.* 63, 96, 104.

(l) *Co. Litt.* 122 a.

are neither commoners nor tenants in common (*m*). Such owner may also create a partial independent right or a limited liberty in another person, as a right to take in such fishery one particular species of fish, or fish for only the table of such person, without derogating from his own right, and, subject to such partial right or limited liberty, still have to all intents and purposes a several fishery (*n*).

A several fishery, when an incident to the ownership of the soil, is severable therefrom (*o*), and may lawfully exist as a right of *profit à prendre* in gross (*p*), but so existing is not within the Prescription Act (*q*).

A several fishery may be acquired not only from private persons, but also by a private person from the Crown, in a creek or an arm of the sea or navigable tidal river (*r*), within the limits of the flux and reflux of the sea (*s*), and even in some known precinct with known bounds within the main sea, *districtus maris* (*t*), below low water mark (*u*), and either by grant, or by prescription, which presupposes a grant (*x*), and either with or without an interest in the soil (*y*); and as an incident to such a fishery, a weir in those places (*z*), and the fishery so acquired from the Crown, will exclude the public from the *primâ facie* right of fishing in such places (*a*).

Severable from the soil.

From whom and where acquired.

(*m*) See *Wilson v. Mackreth*, 3 Burr. 1824; Longf. & T. 99; *Metcalf v. Rorke*, 8 Ir. L. R. 187.

(*n*) *Seymour v. Lord Courtenay*, supra.

(*o*) *Lord Paget v. Milles*, 3 Doug. 43.

(*p*) Co. Litt. 4 b; Hale, De Jure Maris, pt. i., c. i.; 19 C. B., N. S. 709.

(*q*) 2 & 3 Will. 4, c. 71; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

(*r*) *Lord Barclay's case*, Hale, De Jure Maris, 34; *The Royal Fishery of the Banne*, Dav. 55; *Hamilton v. Marquis Donegal*, 3 Ridgw. P. C. 267; 4 Burr. 2162;

Gray v. Bond, 2 Brod. & B. 667.

(*s*) *Murphy v. Ryan*, Ir. L. R., 2 C. L. 143; 16 W. R. 687, *S. C.*

(*t*) Hale, De Jure Maris, pt. i. cc. iv., v., vi.; *Lindsay v. Robertson*, 7 Court Sess. Ca. 3rd ser. 239.

(*u*) *The Free Fishers of Whitstable v. Gann*, 11 C. B., N. S. 387; 13 Ib. 853; 11 H. L. C. 192.

(*x*) Hale, De Jure Maris, passim; *Gray v. Bond*, supra.

(*y*) *Malcomson v. O'Dea*, 10 H. L. C. 598.

(*z*) Hale, De Jure Maris, 21, 22; *Williams v. Wilcox*, 8 Ad. & E. 814.

(*a*) Hale, De Jure Maris, pt. i. cc. iv., v., vi.; *Baggott v. Orr*,

Grant of from the Crown must have been before Magna Charta.

If a several fishery, or a weir as an incident to it, be claimed by grant from the Crown, the grant must have been made prior to Magna Charta, which however has left untouched all fisheries made several to the exclusion of the public by act of the Crown not later than the reign of Henry II. (b). But where the enjoyment of the fishery has been of such a nature as would warrant a presumption of a grant of it having been made before the Great Charter, such a presumption will be made (c).

Reverting to the Crown and merging since Magna Charta not regrantable.

A several fishery acquired from the Crown, if a franchise or liberty which, on reverting to the Crown, merges in the general prerogative right of the Crown (d), and since Magna Charta reverting to the Crown, would no longer exist as a separate franchise, and consequently could not be regrantable by the Crown (e). In a late case in Ireland (f), a several fishery in a navigable tidal river there belonging to the Crown was granted by the Crown in 1611, then reverted to the Crown by forfeiture, and was afterwards, in 1661, re-granted by the Crown. But this question, as to the merger of the fishery, was not raised.

So created and existing may be conveyed since.

And although such a fishery cannot be created by grant from the Crown since the Great Charter, yet,

2 Bos. & P. 472; *Carter v. Muroot*, 4 Burr. 2162; Com. Dig. Prærogative D, 50; *Mayor, &c. of Orford v. Richardson*, 4 T. R. 437; *Richardson v. Mayor, &c. of Orford*, 2 H. B. 182, on error, reversing the decision below, but on a point of pleading only; *Blundell v. Catterall*, 5 B. & Ald. 268; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Malcomson v. O'Dea*, supra; *Williams v. Wilcox*, 8 Ad. & E. 314; *Mannall v. Fisher*, 5 C. B., N. S. 856; *O'Neil v. Allen*, 9 Ir. C. L. R. 132; *Gann v. The Free Fishers of Whitstable*, 11 H. L. C. 192.

(b) *The Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Williams*

v. Wilcox, 8 Ad. & E. 314; *Malcomson v. O'Dea*, 10 H. L. C. 593; *Gann v. The Free Fishers of Whitstable*, 11 H. L. C. 192.

(c) *O'Neill v. Allen*, 9 Ir. C. L. R. 132; *Little v. Wingfield*, 11 Ib. 63; *Malcomson v. O'Dea*, supra; *Williams v. Wilcox*, supra.

(d) See Plowd. 219; *The Abbott of Strata Marcella*, 9 Rep. 24; *Heddy v. Wheelhouse*, Cro. El. 591; *The King v. The Mayor of London*, Show. 274.

(e) See *The Mayor of Colchester v. Brooke*, 7 Q. B. 339.

(f) *Little v. Wingfield*, 11 Ir. C. L. R. 63, 97.

if created before and still existing, may be granted since (*g*).

Separalis piscaria is sometimes said to be all one with *libera piscaria* (*h*); that is, as respects the property in the fish (*i*) before they are taken (*k*). The only substantial distinction, said Willes, J. (*l*), between a free and a several fishery is between an exclusive right of fishery usually called "several," sometimes "free" (used as in free warren), and a right in common with others, usually called "common of fishery," sometimes "free" (used as in free port).

The owner of *separalis piscaria* may maintain an action of trespass *quare clausum fregit* and for fishing therein, for where a right is exclusive trespass lies (*m*), and for taking *pisces suos*, for there is not any other may take them, and he has the property in them before they are taken (*n*); or for disturbing his fishery (*o*), and he may plead it as his franktenement (*p*). He may also seize, by way of distress as *damage feasant*, to stop the further use, boats and other vessels, with all the tackle and other things belonging thereto, nets and other things, of the persons wrongfully fishing in his fishery (*q*).

In many cases of several fishery arises the question, often very difficult to determine, whether the fishery, *jus piscationis*, be an incident to and united in the same person with the ownership of the soil, or be the mere *jus piscationis in alieno solo* (*r*).

(*g*) *The Duke of Devonshire v. Hodnett*, 1 Hud. & Br. 322.

(*h*) Skin. 342; 1 Salk. 637.

(*i*) Skin. 677.

(*k*) *Child v. Greenhill*, Cro. Car. 553; *Seymour v. Lord Courtney*, 5 Burr. 2814.

(*l*) *Malcomson v. O'Dea*, 10 H. L. C. 593, 619.

(*m*) *Wilson v. Mackreth*, 3 Burr. 1824.

(*n*) *Child v. Greenhill*, Cro. Car. 553; *Seymour v. Lord Cour-*

tenay, 5 Burr. 2814; *The Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Holford v. Bailey*, 8 Q. B. 1000; 13 Ib. 426.

(*o*) Ib.

(*p*) See the authorities cited in *Holford v. Bailey*, 8 Q. B. 1000.

(*q*) *Reynell v. Champenoon*, Cro. Car. 228; *Hayes v. Bridges*, Ir. T. R. 390.

(*r*) *The Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Holford v. Bailey*, 8 Q. B. 1000; 13 Ib.

How differing from a free fishery.

Owner may maintain action of trespass,

—and distrain *damage feasant*.

Whether a several fishery includes the soil.

May exist with
or without the
soil.

That a several fishery may exist as well *in alieno solo*, as an incident to the ownership of the soil, seems to have been generally assumed(*s*), and is now generally admitted(*t*), even in the Crown as a fishery in gross in a navigable river where the soil belongs to the owners of the land adjoining(*u*).

Where the
question arises.

In the early cases the question generally arose with reference to the form of action adopted for the redress of an injury to the fishery. The remedy was generally in trespass *quare clausum fregit*, which can be maintained in those cases only where the plaintiff is in the actual, or is entitled to the exclusive possession, or to an exclusive right to a part of the profits(*v*), of the land. Hence the question as to the soil in cases of claims to free and to several fisheries. In such cases(*x*), and in the case of a several fishery, as well when it is *in alieno solo* as when in the soil of the plaintiff(*y*), trespass will lie for disturbing the fishery. In *Seymour v. Lord Courtenay*(*z*), the court said it was not necessary to give any opinion whether a person can have a several fishery without being owner of the soil; for although there was a count in the declaration for breaking the plaintiff's close covered with water, implying the ownership of the soil(*a*), yet there were other counts for disturbing them in their several fishery. The general owner demised to the plaintiffs, reserving a particular species of fishing, the oystery, which, in its nature, is to be exercised in a particular mode; and the reservation being equal to a grant, the question was the same as if the

426; *Malcomson v. O'Dea*, 10 H. L. C. 593; *Marshall v. The Ulsterwater Steam Navigation Co.*, 8 B. & S. 732.

(*s*) Co. Litt. 4 b, 122 a; *The Duke of Somerset v. Fogwell*, supra.

(*t*) *Holford v. Bailey*, supra; *Malcomson v. O'Dea*, supra; *Marshall v. The Ulsterwater Steam Navigation Co.*, supra.

(*u*) See *The Banne Fishery case*, Dav. 55, 57.

(*v*) *Wilson v. Mackreth*, 3 Burr. 1824.

(*w*) F. N. B. 88, G. H.; Com. Dig. Trespass, A. 2.

(*y*) *Holford v. Bailey*, 8 Q. B. 1000; 13 Ib. 426.

(*z*) 5 Burr. 2814.

(*a*) Comb. 434.

plaintiffs, being the general owners, had granted the sole right of fishing for oysters to the lessor, so that the plaintiffs, except as to them, would still have had a several fishery. In *Holford v. Bailey*, the court observed, that in the prior cases the declaration generally contained an allegation of the taking of the plaintiff's fish, which is clearly the subject of an action of trespass (*b*), and is independent of the ownership of the soil; and in some of those cases the allegation was of the taking of the fish, not of the plaintiff, but "of the fishery" (*c*); meaning, however, it would seem, the fishery of the plaintiff, and therefore his fish. In the case before the court, the declaration contained neither kind of allegation. Much of the doubt and difficulty involved in this question would seem to have originated in regarding the fishery instead of the land as the principal subject, and the land instead of the fishery as the accessory or adjunct.

The *jus piscationis* arises from, and is incident to, the ownership of the soil (*d*); and although not necessarily united with the soil, yet, until the contrary be shown (*e*), or, being claimed by grant, the terms of the grant are unknown (*f*), is presumed to follow such ownership. When so claimed, however, and the terms of the grant are known, and are such as to convey an incorporeal hereditament only, the presumption of the fishery following the ownership of the soil is destroyed (*g*). But the ownership of the soil neither arises from, nor is incident to, the ownership of the

The connection of the ownership of the *jus piscationis* and of the soil.

(*b*) 8 Q. B. 1016.

(*c*) 13 Q. B. 444.

(*d*) L. R., 2 E. & I. A. C. 165.

(*e*) 18 Hen. 6, 29; *Partheriche v. Mason*, 2 Chitty, 658; *The King v. Old Almgford*, 1 T. R. 358; *Holford v. Bailey*, 8 Q. B. 1000, 1016; 13 Ib. 426, in error; *Marshall v. The Ulsterwater Steam*

Navigation Co., 3 B. & S. 732; 6 Ib. 570; *Malcomson v. O'Dea*, 10 H. L. C. 593.

(*f*) *Duke of Somerset v. Fogwell*, 5 B. & C. 875. See also *The Free Fishers of Whitstable v. Gann*, 11 C. B., N. S. 387, 413.

(*g*) *Duke of Somerset v. Fogwell*, *supra*.

fishery. The ownership of the fishery may be altogether distinct from, and be exclusive and independent of, any sort of ownership in the soil (*h*), and may exist, even in the Crown (*i*), as a fishery in gross (*k*).

In inland
rivers,

A several fishery in an inland river alleged in a declaration in an action of trespass is, *primâ facie*, to be assumed as in the soil of the plaintiff, and that inference is not negatived by an allegation in the same declaration that the fishery is *in alieno solo*, and if there be no averment by the defendant in his plea, that he claims under or acts by the authority of the owner of the soil, the plaintiff need not show a title either by grant or by prescription to the fishery (*l*).

—lakes,

In *Marshall v. The Ulleswater Steam Navigation Company* (*m*) accordingly, in an action of trespass for entering the land of the plaintiff covered with water, and for disturbing certain *several* fisheries of the plaintiff in certain land covered with water, the defendant pleaded amongst other pleas that the land in which were the alleged fisheries of the plaintiff was the soil and freehold of divers persons, and that the defendants acted by the leave and in the exercise of the rights of such last-mentioned persons as such owners of the soil and freehold; whereupon the plaintiff was compelled to prove his title, and proved a title to a several fishery by showing a conveyance of a fishery, and in such a mode as to pass the soil and the *jus piscationis* as an incident thereto. In *Shuttleworth v. Le Fleming* (*n*), the action was trespass on land of the plaintiff, to which the defendant pleaded that the land was part of the shore of an inland lake or water called Coniston or Thurston water, and then a prescriptive right to a “free fishery” in the said

(*h*) *Seymour v. Lord Courtney*, 5 Burr. 2814; *Duke of Somerset v. Fogwell*, supra; *Holford v. Bailey*, supra.

(*i*) *The Banne Fishery case*, Dav. 55, 57.

(*k*) 19 C. B., N. S. 709.

(*l*) *Holford v. Bailey*, 13 Q. B. 426; 13 Jur. 280; 18 L. T., N. S. 112, S. C.

(*m*) 3 B. & S. 732.

(*n*) 19 C. B., N. S. 687.

water. The court, however, would not decide whether the words "free fishery" meant a sole several fishery, or a common of fishery.

A several fishery in a navigable river may exist in the Crown, whilst the owners of the land on each side of the river may be also the owners of the soil of the bed of the river, and is then an inheritance in the Crown in gross, and will not pass by a grant from the Crown of lands of the Crown adjoining the river, *piscarias, piscationes, aquas, aquarum cursus, &c. (o)*. —and navigable rivers.

The ownership of both the soil of a stream and the water, when and so far as it can be the subject of ownership, may either follow (*p*) or be independent of the ownership of the land adjoining the stream (*q*); and in the latter case the ownership need not extend over or to any greater portion of the soil of the stream than may be necessary as a substratum for, or otherwise required in connection with, the fishery (*r*).

Where a several fishery is derived from the Crown the *jus piscationis* may also be either an incident to, and united in the same person with, the ownership of the soil, or may be distinct from such ownership, which may continue in the Crown; and from the nature of the case, and as such a fishery is generally in either the open sea below low water mark within certain limits, *districtus maris*, or between high water mark and low water mark, or in an arm or a creek of the sea, or in a port or haven, between those marks (*s*), the question whether the *jus piscationis* be such an incident and so united, or be thus distinct, rests on different considerations, and is more difficult to determine than in the case of a several fishery derived from a private person.

(o) *The Royal Fishery of the Banne*, Dav. 55.

(p) *Ib.*

(q) See *Marshall v. The Ulsterwater Steam Navigation Co.*, 3 B. & S. 732, 742.

(r) See *Hamilton v. Marquis Donegal*, 8 Ridgw. P. C. 267; *The King v. Ellis*, 1 M. & S. 666.

(s) *Hale, De Jure Maris*, pt. i. cc. iv., v., vi.

In the sea.

The property or ownership of the sea and the soil of it, and, as a consequence of such ownership, the right of fishing in the sea and in the creeks and arms thereof, so far as the sea flows (*t*), the shore, *littus maris*, that is, the ground between the high water mark and the low water mark at ordinary, but not at high-spring, or extraordinary tides (*u*); and all increase of land by the sea, *per alluvionem*, *per recessum maris*, or a sudden retreat of the sea, and islands arising in the sea, or in the arms of it, are *primâ facie* (*x*), and, until the contrary be shown, are presumed to remain (*y*), in the Crown.

Distinction between an estuary and an arm of the sea.

An estuary and an arm of the sea, although having the common characteristic of being *intra fauces terræ*, are distinguishable. Some rivers terminate without passing through any firth or estuary, and are lost in the open ocean almost as soon as they touch the salt water; others only join the ocean through a firth, or through a land-locked valley, where the fresh and salt waters meet (*z*). An estuary is the space intermediate between the strictly proper river, and the strictly proper sea. Through this partly fresh and partly salt estuary, the river, though its ordinary river features may be impaired, or at high tides even obliterated, still in truth exists and operates, though its existence be only continued among sands and shaulds through which it has to work its way, struggling with the tide. . . . The estuary is a part of the river, and is included under this word (*a*).

(*t*) *Murphy v. Ryan*, Ir. L. R. 2 C. L. 143; 16 W. R. 687, S. C.

(*u*) Hale, *De Jure Maris*, pt. i. c. iv.; *Blundell v. Catterall*, 5 B. & Ald. 268, 291; *Att.-Gen. v. Chambers*, 4 De Gex, M. & G. 206; 8 B. & Ad. 869; *Smith v. Officers of State for Scotland*, 13 Jur. 713; 6 Bell's App. Ca. 487, S. C.

(*x*) Hale, *De Jure Maris*, pt. i. c. iv.; *Att.-Gen. v. Burridge*, 10 Pri. 350; *Williams v. Wil-*

coz, 8 Ad. & E. 814, 333; 1 Macq. H. L. C. 49; 10 H. L. C. 618.

(*y*) 1 Anstr. 614; 5 B. & Ald. 304; *Att.-Gen. v. Chambers*, 18 Jur. 779; 10 Pri. 400; 13 Jur. 716; 8 Ell. & B. 904.

(*z*) 16 Court Sess. Ca. 1st ser. 1291, 1292.

(*a*) 5 Dow, 289, 290; *MacKenzie v. Horne*, 16 Court Sess. Ca. 1st ser. 1292.

An arm of the sea is said to be where the sea flows and reflows, and so far only (b). In a recent case in Scotland, however (c), the court said that when the junction of the fresh water and the salt takes place, not at the edge of the open ocean, but far up in the land where the river loses itself in arms or bays of the sea, these portions of the ocean become what are called arms of the sea, and that they are so called merely because they happen to be enclosed within ridges, *intra fauces terræ*, which guide the waters into the interior. But this circumstance does not make these arms identical with estuaries. These arms are the sea.

A subject may acquire by grant of the Crown the soil of the sea itself, as of a *districtus maris*, a place in it between certain points, or a particular part contiguous to the shore (d), or of a port or a creek or arm of the sea, and both in the water and the soil itself covered with water within such a precinct, and also the soil of an arm of the sea, and, as a consequence or concomitance of such acquisition, any accession of land *per relictionem* or *recessum maris* (e). So also in an arm of the sea with a manor (f), though in gross and not parcel of it, and also, by apt and proper words, lands contiguous to the sea (g), which will pass land *per alluvionem*, but not *per relictionem*. So also in the *littus maris*, or shore between high water mark and low water mark (h), that is, between those marks at ordinary tides (i), or the ordinary flux and reflux of the

How the sea-shore may be acquired by a subject,

(b) Hale, De Jure Maris, pt. i. c. iv.

(c) *Mackenzie v. Horne*, supra.

(d) See Hale, De Jure Maris, pt. i. c. vi.; *The Free Fishers of Whitstable v. Gann*, 13 C. B., N. S. 853; *Gann v. The Free Fishers of Whitstable*, 11 H. L. C. 192.

(e) Hale, De Jure Maris, pt. i.

cc. v., vi.; *Duke of Beaufort v. Mayor, &c. of Swansea*, 3 Ex. 413.

(f) *Ib.*

(g) See *Parmeter v. Att.-Gen.* 10 Pri. 412.

(h) Hale, De Jure Maris, pt. i. cc. v., vi.; *Att.-Gen. v. Burridge*, 10 Pri. 350.

(i) Hale, De Jure Maris, supra.

sea (*j*), and not at extraordinary or spring tides, and as those marks exist from time to time, either by the alluvion (*k*), or by encroachment (*l*), or by the gradual dereliction (*m*) of the sea.

—with the
right of fish-
ing.

The sea shore may not only belong to a subject in gross, which possibly may suppose a grant before time of memory (*n*), but it may be parcel of the manor of a subject (*o*), and the lord may have the exclusive right of fishing as such lord, but only as appendant or appurtenant to the manor by prescription, and consequently from time immemorial (*p*).

Different
rights may
exist in such
land.

In land lying between high water mark and low water mark, different rights may be vested in a subject. One person may have the soil itself alone, and another the general privilege of fishing, or of laying, keeping, and taking oysters on that spot, and both may afterwards become united in the same person; and if the privilege continue to exist distinct from and do not merge in the general right to the soil, or if the title to one were invalid, the grant of one would not necessarily pass the other (*q*). A grant of the soil will not necessarily convey the privilege of fishing, because all the king's subjects have a right to fish (*r*).

Public rights
on the sea-
shore.

And as the public have no right, at common law, to bathe in the sea, so they have no right to pass over such land so acquired by a subject, for the purpose of bathing in the sea (*s*); nor have they any right to

(*j*) Per Holroyd, J., *Blundell v. Catterall*, 5 B. & Ald. 268, 291.

(*k*) *The King v. Lord Yarborough*, 3 B. & C. 91; 5 Bing. 168.

(*l*) *Scrutton v. Brown*, 4 B. & C. 485.

(*m*) *Ex parte Lord Gwydir*, 4 Mad. 281.

(*n*) Hale, *De Jure Maris*, 26.

(*o*) *Constable's case*, 5 Rep. 106; *Ex parte Lord Gwydir*, 2 Mad. 281; *The King v. Lord*

Yarborough, 3 B. & C. 91; 5 Bing. 168; *Duke of Beaufort v. Mayor, &c. of Swansea*, 3 Ex. 413; *Calmeady v. Rowe*, 6 C. B. 681. See also *Wenman v. Mackenzie*, 5 Ell. & B. 447.

(*p*) Per Holroyd, J., *Blundell v. Catterall*, 5 B. & Ald. 268, 288.

(*q*) See *Scrutton v. Brown*, 4 B. & C. 485.

(*r*) *Ib.*

(*s*) *Blundell v. Catterall*, 5 B. & Ald. 293.

take on or from any such land any shell fish (*t*) or seaweed (*u*), or the like.

In *Blundell v. Catterall* (*v*), the plaintiff was stated to be the owner of the soil of the shore, and to have the exclusive right of fishing thereon, with stake nets, as lord of the manor; so that the soil, as parcel of or belonging to the manor, must have been so from before the time of passing the statute *Quia emptores terrarum*, tempore Edward I., since which time no manor can have been created. He was also stated to have the exclusive right of fishing, as lord of the manor, and that could only be as appendant or appurtenant to the manor, and must therefore be by prescription and consequently from time immemorial. And the decision was that the public have not a common law right to bathe in the sea, and to pass over the sea shore for that purpose on foot and with horses and carriages to the extent of the *locus in quo* only, and not as to such right in the shore generally. And Holroyd seemed to think that if such general right existed it might be, by prescription, at least otherwise appropriated, as well as an exclusive right of fishing in particular places (*w*).

But although a subject may have such an acquisition it will not displace or interrupt the right of navigation by the public (*x*), nor necessarily the right of fishing by the public (*y*); nor any easement incident to those rights the public may have over the shore (*z*). *A for-*

Blundell v. Catterall.

Acquisition from the Crown will not affect public rights.

(*t*) See *Bagot v. Orr*, 2 Bos. & P. 472; *Duke of Argyll v. Robertson*, 22 Court Sess. Ca., 2nd ser. 261, 265; *Hall v. Whillis*, 14 Ib. 324; *Lindsay v. Robertson*, 5 Ib., 3rd ser. 864; 7 Ib. 239; *Duke of Portland v. Gray*, 11 Ib., 1st ser. 14.

(*u*) *Hove v. Stamell*, Al. & Nap. 348.

(*v*) 5 B. & Ald. 268.

(*w*) See *Carter v. Murocott*, 4 Burr. 2162.

(*x*) *Blundell v. Catterall*, 5 B. & Ald. 293; *The Queen v. Haynes*, 7 Ir. L. R. 2; *The Free Fishers of Whitstable v. Gann*, 11 H. L. C. 192.

(*y*) *Blundell v. Catterall*, supra; *Scrutton v. Brown*, 4 B. & C. 485.

(*z*) *Att.-Gen. v. Burridge*, 10 Pri. 350; *Parmeter v. Att.-Gen.*, Ib. 412; 18 Jur. 716; 6 Q. B. 374; 18 C. B., N. S. 857.

Right of navigation.

tiori where the acquisition is of the soil below low water mark (*z*). So in the case of public navigable rivers (*a*).

The right of navigation, although not affected by an obstruction of it for twenty years (*b*), may be determined, when in a public navigable river, either by the legislature, or by a writ of *ad quod damnum*, with an inquisition found thereupon by a jury, or may be extinguished by natural causes (*c*).

Ownership of the soil of public rivers below,

In determining the ownership of the soil of public rivers some distinctions are to be observed. Rivers are public either in point of property and of use, or as to use only (*d*). Rivers into and from which the tide flows and reflows, and up to the point reached by the flow, are of the former class; but such flux and reflux in any particular place, although strong *primâ facie* evidence of the place being, do not necessarily make it, even when of a sufficient size, a public navigation (*e*). Whether such or not must depend upon the situation and the nature of the channel where the flux and reflux occur (*f*). The soil of navigable tidal rivers, as well above as below the flow of the sea, is, *primâ facie*, in the Crown (*g*), but may be acquired by a subject (*h*). But the soil of such rivers above the point reached by the flow of the tide is not necessarily, even *primâ facie*, in the Crown, but in the owner of the adjoining lands, and in these, as also in fresh water rivers in the soil of which the Crown has no property, the public have the

(*z*) *Gann v. The Free Fishers of Whitstable*, 11 H. L. C. 192.

(*a*) *Williams v. Wilcox*, 8 Ad. & E. 314; *Att.-Gen. v. Earl of Lonsdale*, 20 L. T. R., N. S. 64.

(*b*) *Vooght v. Winch*, 2 B. & Ald. 662.

(*c*) *Rex v. Montague*, 4 B. & C. 598, 603.

(*d*) Hale, *De Jure Maris*, pt. i. cc. ii., iii., iv.

(*e*) *Mayor of Lynn v. Turner*,

Cowp. 86; *Miles v. Rose*, 5 Taunt. 706; *Rex v. Montague*, 4 B. & C. 598.

(*f*) *Miles v. Rose*, *supra*.

(*g*) Hale, c. iv.; 2 Roll. 120, l. 20; Dav. 56; *The King v. Smith*, 2 Doug. 441; *Carter v. Murcott*, 4 Burr. 2162; *Att.-Gen. v. Earl of Lonsdale*, 20 L. T. R., N. S. 64.

(*h*) See Hale, *De Jure Maris*, p. i. c. iii.; *Att.-Gen. v. Earl of Lonsdale*, *supra*.

use as public ways (*i*). Sometimes, however, the latter class of rivers are said to be (*j*), but erroneously (*k*), public rivers in point of property. Locks or lakes seem to be of the latter class (*l*).

In *Williams v. Wilcox* (*m*), the court intimated a doubt whether the ownership of the soil of the bed of public navigable rivers above the point reached by the flow of the tide be in the Crown or in the owners of the adjacent lands. But in *Murphy v. Ryan* (*n*), the court said that upon a full consideration of all the cases, it would appear that no river has been ever held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purposes of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *prima facie* in the riparian owners, and the right of fishing private.

A several fishery for only one species of fish in the same water or in the same part of the same water would not involve the property of the soil, for if such a fishery could be construed to draw the soil this absurdity would follow, that by such grants such a fishery might be conveyed to as many different persons as there are kinds of fish (*o*), and would be understood as a several fishery in the same water. This consideration was not adverted to in *Seymour v. Lord Courtenay* (*p*), or in the very recent case of *The Free Fishers of Whitstable v. Gann* (*q*). No such objection would arise if the

—and above
the flux of the
tide.

A several
fishery for only
one sort of
fish would not
include the
soil.

(*i*) Hale, cc. ii., iii.

(*j*) *Ib.*; *The Royal Fishery of the Banne*, Dav. 55.

(*k*) Hale, *De Jure Maris*, cc. ii., iii.

(*l*) See *Macdonnell v. Caledonian Canal Commissioners*, 8 Court Sess. Ca., 1st ser. 880; *Marshall v. The Ulsterwater Steam Navigation Company*, 3 B. & S.

732.

(*m*) 8 Ad. & E. 814, 338.

(*n*) *Ir. L. R.*, 2 C. L. 143; 16 W. R. 687, *S. C.*

(*o*) *Hayes v. Bridges*, *Ir. T. R.* 390.

(*p*) 5 Burr. 2814.

(*q*) 11 C. B., N. S. 387; 13 *Ib.* 858; 11 H. L. C. 192.

Ownership of
the soil of
fresh-water
rivers,

fishery were granted in different parts of the same water (*r*).

All freshwater rivers, of common right, belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the property of the soil, and consequently the right of fishing, *usque filum aquæ*; and so the owners of the other side (*s*). If the river change its course and take it entirely on the lands of the other, the whole river belongs to the other. *Aqua cedit solo* (*t*). And acts of ownership on the whole bed of a river by the owner of land on one side, below the land of the owner on the other side, are admissible to support a claim by the owner doing such acts to the whole bed of the river opposite to the land of the owner on the other side (*u*).

Although the *alveus* of a stream is divided between the two proprietors of the opposite banks, and is held by each up to the *medium filum* in sole property on either side (*x*), it by no means follows that they have not common interests. They have a common interest in the water. In water alone, as such, there can be no property, either sole or conjunct: but there is a common interest in the water, and out of that common interest in the water there also necessarily arises a common interest to each in the whole *alveus* over which the water runs, and a common interest in the banks of the stream, although they are unquestionably the sole property of the parties whose estates they adjoin (*y*). But although so entitled to the *alveus*, it does not by any means

(*r*) *Hamilton v. Marquis of Donegal*, 3 Ridgw. P. C. 267.

(*s*) Hale, *De Jure Maris*, cap. 1; 8 Ir. C. L. R. 291; *Lord v. The Commissioners of the City of Sydney*, 12 Moo. P. C. C. 473; *Rea v. The Inhabitants of Landulph*, 1 Moo. & R. 393; *Wishart v. Wyllie*, 1 Macq. 389. So in Scotland, *Morris v. Bicket*, 2 Court Sess. Ca., 3rd ser. 1082; 15

Ib., 1st ser. 261, n.; L. R., 1 H. L. Sc. 47.

(*t*) Hale, *De Jure Maris*, pt. i. c. i.

(*u*) *Jones v. Williams*, 2 M. & W. 326.

(*x*) 5 Court Sess. Ca., 3rd ser. 216, 699; *Bicket v. Morris*, 4 Ib., H. L. 44, 50; L. R., 1 H. L. Sc. 47.

(*y*) *Morris v. Bicket*, 2 Court Sess. Ca., 3rd ser. 1082, 1087, 1090.

follow that that property is capable of being used in the ordinary way in which so much land uncovered by water might be used, but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream (*z*). If the same person be the owner of the land on both sides, in common presumption he is owner of the whole river (*a*), and hath the right of fishing according to the extent of his land in length. But special usage may alter that presumption; for one man may have the river, and others the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in the river (*b*).

The owners of land adjacent to some navigable tidal rivers, as the Severn, have sometimes the same common rights (*c*), but sometimes such right of fishing only (*d*).

—some navigable rivers,

The ownership of the soil of and the right of fishing in lakes or lochs, appear to be determined, both in England and in Scotland, by the same principles as are applied to the ownership of the soil of and the right of fishing in fresh water rivers (*e*). In *Marshall v. The Ulleswater Steam Navigation Company*, the court said, whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owners of the land or of the manors on either side *ad medium filum aquæ*, or whether it belongs *primâ facie* to the king in right of his prerogative (*f*), it was not in that case necessary to determine, for it is clear upon the authorities that the soil of land covered with water may, together with the water and

—lakes or lochs.

(*z*) *Bicket v. Morris*, 4 Court Sess. Ca., H. L. 44, 52; L. R., 1 H. L. Sc. 47.

(*a*) 5 Court Sess. Ca., 3rd ser. 216, 699.

(*b*) Hale, *De Jure Maris*, cap. 1; Fitzh. Sci. Fa. 100; Bro. Ab. Tenures, pl. 75; 20 Vin. Ab. 201, pl. 4.

(*c*) Hale, *De Jure Maris*, cap. 1; 1 Mod. 106; 4 Burr. 2162.

(*d*) See *Gray v. Bond*, 2 Brod. & B. 667.

(*e*) See *Menzies v. Macdonald*, 2 Macq. H. L. C. 463; *Marshall v. Ulleswater Steam Navigation Company*, 3 B. & S. 732; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; *Montgomery v. Watson*, 23 Court Sess. Ca., 2nd ser. 635; *Macdonnell v. Caledonian Canal Commissioners*, 8 Ib., 1st ser. 881.

(*f*) Com. Dig. Prærogative, D. 50; Hale, *De Jure Maris*, c. i.

the right of fishery therein, be specially appropriated to a third person, whether he have land or not on the borders thereof.

Ownership of the soil may be indicated

(i) By the nature of the fish,

—which may be either floating or shell.

The ownership of the soil of a several fishery may be indicated by the nature of the fish to be taken, by the mode of exercising the *jus piscationis*, by the nature of the acts of ownership in relation to the fishery, and by the mode of conveying the fishery.

Any kind of fishery, whether an incident to the ownership of the soil, or whether the mere *jus piscationis in alieno solo*, may be either for floating fish or for shell fish, or for all fish; but as respects a fishery for floating fish the ownership of the soil is of less importance than as respects a fishery for shell fish (*g*); and even for the latter is not absolutely essential (*h*).

Floating fish and shell fish, what.

Fish is either floating fish or shell fish, as oysters, mussels, lobsters, and the like. Sometimes the terms floating fish and shell fish are used, and sometimes the former is used in contradistinction to the latter, and sea fish synonymously with floating fish, and sea fish as not including shell fish (*i*) Some shell fish, however, as oysters and mussels, stand in complete contrast to floating fish. Such shell fish adhere to the rocks or shore, and are practically fixtures and parts of the soil, but floating fish are unconnected with any locality, and appear in different portions of the sea, without any one knowing whence they come or whither they go (*k*).

Mussels.

The mussel is attached to the soil with a peculiar tenacity that is very remarkable in the natural history of the animal; so much so that it is a trespass and encroachment upon the soil if any one takes from it any settlement of these animals that is so attached. Other

(*g*) See *Bridges v. Highton*, 11 L. T. R., N. S. 658.

(*h*) See *Scrutton v. Brown*, 4 B. & C. 485; 11 C. B., N. S. 406.

(*i*) See *Bridger v. Richardson*, 2 M. & S. 568.

(*k*) See *Duchess of Sutherland v. Watson*, 6 Court Sess. Ca., 3rd ser. 199.

facts show its close connection with, and to be almost an integral part of the soil. The characteristics of the mussel are—(1) it has so little power of motion that it may be regarded as immovable and localized; (2) it is gregarious; (3) it is capable of cultivation and artificial propagation; (4) its chief habitation is in sand or mud banks, in estuaries or creeks near the shore. By these it is distinctly marked off not only from floating fish, but from lobsters, which have great power of motion, and other shell fish; like whelks, which do not congregate in scalps, but move about. The mussel has also powers and organs of locomotion, which it puts in operation, particularly early in life; but when it has once settled down, it seems to do so *animo remanendi*, and there it remains generally for the full period of its life, till dislodged by some violent means, or till some other extraordinary circumstance occurs (*l*). Mussels, although, in natural history, of the class molluscs, in law are considered as fish (*m*).

There is a distinction between an oystery and a Oysters. fishery, in the common use of the term. The one applying to the use of land under the water, which is peculiarly adapted to the growing of oysters, and to be used for that purpose in the cultivation of oysters, as other lands are used for the purpose to which they are peculiarly adapted. Whereas a fishery, in common acceptation, has reference to the use of the water for floating fish, and this is a very obvious and natural distinction (*n*). And with respect to a right of fishery there is a marked distinction, both in reason and authority, between the right in relation to floating fish, and the right of dredging for oysters. The latter is entirely local and connected with the soil. There are natural

(*l*) *Duchess of Sutherland v. Watson*, 6 Court Sess. Ca., 3rd ser. 199.

(*m*) See *Duchess of Sutherland v. Watson*, 6 Court Sess. Ca., 3rd

ser. 199, 214.

(*n*) Per Thompson, J., *Martin v. Widdell*, 14 Curt. Am. Rep. 345, 358.

beds of oysters, but in other places there is a peculiar soil, adapted to the growing of oysters. They are planted and cultivated by the hand of man like other productions of the earth; and the books in many cases (*q*) clearly hold such a distinction, and speak of the oyster fishery as distinct from that of floating fish (*r*). The public may be entitled to catch floating fish, and yet not be justified in dredging for oysters, which may be private property (*s*).

In *Scrutton v. Brown* (*t*), the general privilege of fishing is distinguished from that of laying, keeping and taking of oysters. An oystery in its nature is to be exercised in a particular mode (*u*). A several fishery for oysters has been established in several cases (*x*), and in one case with the soil as parcel of the manor of the claimant (*y*). In the case of *The Free Fishers of Whitstable v. Gann* (*z*), it was argued that an oyster fishery necessarily differs from every other sort of fishery, the possession of the soil being essential to it, but Erle, C. J., said an easement would be enough. He said, however, and it was held, that considering the nature of an oyster fishery there is the strongest possible presumption that the soil would be granted. There was nothing to show that at the time of the original grant the soil was not granted, and the nature of the grant would render necessary a grant of the soil (*a*).

A free or a several fishery for oysters would require soil, or the right to use soil, sufficient for the beds, and a grant by the Crown of a several fishery in an arm of the sea, or a navigable river, or in the sea below low

(*q*) See *Seymour v. Lord Courtney*, 5 Burr. 2814; *Rogers v. Allen*, 1 Camp. 309.

(*r*) *Ib.*

(*s*) Per Heath, J., *Rogers v. Allen*, *supra*.

(*t*) 4 B. & C. 485.

(*u*) 5 Burr. 2817.

(*x*) *Hayes v. Bridges*, Ir. T. R. 390; *Bridges v. Highton*, 11

L. T. R., N. S. 653; *Gann v. The Free Fishers of Whitstable*, 11 C. B., N. S. 387; 13 *Ib.* 853; 11 H. L. C. 192.

(*y*) *Wenman v. Mackenzie*, 5 Ell. & B. 447.

(*z*) 11 C. B., N. S. 387, 406.

(*a*) Per Erle, C. J., 11 C. B., N. S. 413, 414. See also *Scrutton v. Brown*, 4 B. & C. 485.

water mark, might include a portion of the soil for the purpose of the fishery (*b*). Lord Chelmsford indeed said there was no instance appearing of a right of several fishery in the open sea below low water mark granted by the Crown.

Although oysters are considered as fish, yet whether oyster spat can be so considered has been questioned (*c*). Oyster spat.

Scalps or beds for oysters and mussels are *partes soli*, parts of the foreshore, accessories of the soil, as much as seaweed or any other plant (*d*), and may be appropriated, or be granted by the Crown to a subject (*e*). Oyster and mussel beds.

In relation to the rights of fishing of oysters and of mussels, no difference exists in the legal principles applicable to the two rights of fishery on the ground that mussels are extensively used by fishermen as bait in catching white fish, which oysters are not. These rights however are usually classed together, and the same principles apply to both (*f*). Mussels being used as bait makes no difference in the legal principles to these two fisheries.

Lobsters hold an intermediate place between oysters and mussels on the one hand, and floating fish on the other. They have the power of locomotion in a great degree, but in certain seasons they are chiefly found attached to rocks or near them. They are caught by sinking baskets or creels properly baited, sometimes a considerable way from the shore, and in pretty deep water, and by persons who never leave their boat, but remain all the while afloat in the open sea. This seems to take the lobster from the class of localized or semi-domesticated animals, such as . . . fish in a pond, or oysters in a scalp, but to place it among the *feræ naturæ*, like game on land, or common fish in rivers or Lobsters.

(*b*) *Gann v. The Free Fishers of Whitstable*, 11 H. L. C. 192.

(*c*) See *The Mayor of Maldon v. Woolvet*, 4 Per. & Dav. 26.

(*d*) *Duchess of Sutherland v. Watson*, 6 Court Sess. Ca., 3rd ser. 199, 204, 213.

(*e*) See *Duke of Portland v.*

Gray, 11 Court Sess. Ca., 1st ser. 14; *Lindsay v. Robertson*, 5 Ib., 3rd ser. 864, 868; *Duchess of Sutherland v. Watson*, 6 Ib. 199.

(*f*) See *Duchess of Sutherland v. Watson*, 6 Court Sess. Ca., 3rd ser. 199.

the sea, which last are not the subject of property until caught (*f*).

Whether an exclusive right to fish for lobsters can be acquired.

It has not been decided in any reported case whether an exclusive right to fish lobsters on the coast of an arm of the sea, or in a navigable river, can be competently granted by the sovereign, or acquired by the subject. A grant by the Prince of Scotland of lands "*cum piscationibus salmonum et aliorum piscium*," without an exclusive possession of lobster fishings following on it, has been held not to pass to the grantee an exclusive right to the fishing of lobsters (*g*).

(ii) By the mode of fishing:

The mode of exercising the *jus piscationis*, or the mode of fishing, may afford indication of the ownership of the soil of a several fishery.

—with nets,

Fishing may be of two kinds ordinarily, viz., the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or property in it; or otherwise it is a local fishing, that ariseth by and from the property of the soil. Such as *gurgites*, *weares*, fishing-places, *borachie*, *stachie*, &c., which are the very soil itself (*h*). Fishing by stake-nets is of modern origin (*i*).

(which may be acquired by usage)

These modes of fishing a subject may have by usage, either in gross or as parcel of or appendant to their manors, and not only in navigable rivers and arms of the sea, but in creeks and ports and havens, yea and in certain known limits in the open sea contiguous to the shore (*j*), and are applicable for not only small sea-fish, but also for great fish, as salmon, and even royal fish when claimed by a subject, as they may be by pre-

(*f*) *Duke of Portland v. Gray*, 11 Court Sess. Ca., 1st ser. 14, 17, n.

(*g*) *Duke of Portland v. Gray*, 11 Court Sess. Ca., 1st ser. 14.

(*h*) Hale, *De Jure Maris*, pt. i. c. v.; Plowd. 154; Co. Litt. 56; *Blundell v. Catterall*, 5 B. &

Ald. 268; *Ramstorne v. Backhouse*, 3 L. R., C. P. 67.

(*i*) See *Berins v. Bird*, 12 L. T. R., N. S. 306; *Olding v. Wild*, 14 Ib. 402; described 5 Dow, 282.

(*j*) Hale, *De Jure Maris*, c. v. 18, 19, 20, 21.

scription and as appurtenant to a manor (*k*). The only royal fish are whale, sturgeon and porpoise. Salmon and lamprey are not royal fish (*l*), although the salmon fishings in the open sea around the coast of Scotland are part of the hereditary revenues of the Crown (*m*). Salmon are only great fish (*n*).

Fishing by the rod has been said to be of a mean —the rod. kind, which, when persons living in a good neighbourhood are permitted to use, does not constitute a right of salmon fishing, but may well be ascribed to the indulgence of good neighbourhood (*o*).

The modes of fishing in the sea may be such as render the use and possession of the coast essential, as by stake-nets, bag-nets, and by net and coble, and other similar modes; all of which imply either the connexion of the apparatus with the coast, as in the case of stake-nets and bag-nets, or the use and possession of the coast, as in the case of net and coble (*p*). The modes of fishing in the sea.

In grants of fisheries the mode of fishing is sometimes specified and is adapted to only floating fish, and so, by implication, exclude shell fish (*q*), or *vice versa* (*r*); and is sometimes, although in terms to some extent specific, yet in effect general, e. g., as well with nets of every kind as in any other manner (*s*). Specified in a grant may exclude some kind of fish.

The ownership of the soil of a several fishery may be indicated by the nature of the acts of ownership of the soil, from the nature of the acts of ownership exercised (iii) By the nature of the acts of ownership.

(*k*) Co. Litt. 114 b; Hale, De Jure Maris, pt. i. c. v.

(*l*) Ib. c. vii.

(*m*) *Gammell v. The Commissioners of Woods and Forests*, 3 Macq. 419.

(*n*) Hale, De Jure Maris, pt. i. c. v.

(*o*) *Smollett v. Colquhoun*, 14 Court Sess. Ca., 1st ser. 963, n.; *Duke of Sutherland v. Ross*, Ib. 960. See also *Maxwell v. Copland*, 7 Ib., 3rd ser. 142.

(*p*) *Gammell v. Commissioners*

of Woods and Forests, 3 Macq. 419.

(*q*) *Bridger v. Richardson*, 2 M. & S. 568.

(*r*) *Seymour v. Lord Courtenay*, 5 Burr. 2814; *Hayes v. Bridges*, Ir. T. R. 390; *Bridger v. Richardson*, supra; *Duke of Portland v. Gray*, 11 Court Sess. Ca., 1st ser. 14, 17, n.

(*s*) See *Hamilton v. The Marquis Donegal*, 3 Ridgw. P. C. 267, 271, 276.

over the fishery, as the making of weirs in it (*t*), the laying of nets between high and low water marks, fixed to iron staunchions driven into the soil (*u*).

It has been said, however, that the right to fix stakes in the sea shore and to fix nets to such stakes does not necessarily involve any title to any portion of the soil of the shore, but is an incorporeal and not a territorial right (*x*). The removal of such weirs, under the authority of Magna Charta and the statutes made in aid thereof in any several fishery involved in the ownership of the soil, is no disaffirmance of such ownership, but merely a removal of an obstruction to a common public right (*y*).

(iv) By the mode of conveyance.

Another indication of the ownership of the soil of a several fishery is afforded by the mode of conveying the fishery. In grants of fisheries, especially in ancient grants, the nature and extent of them, as involving the ownership of the soil, or as being a mere *jus piscationis in alieno solo*, depend on the terms employed in describing the fisheries, coupled with contemporaneous and subsequent usage of them (*z*).

Grant, &c.

A grant (*a*), a recovery, a lease and release (*b*), and *à fortiori* a feoffment with livery of seisin (*c*), of a fishery, *piscaria*, by the owner of the soil will pass the soil (*d*), together with the water when stagnant, or when flowing from one part to another over the land of the same owner, and not over the land of any other

(*t*) *The Abbot of Hulm's case*, Hale, De Jure Maris, pt. i. c. v.

(*u*) See Hale, De Jure Maris, 19, 20; *Blundell v. Catterall*, 5 B. & Ald. 268; *Calmaidy v. Rome*, 6 C. B. 861.

(*x*) See *Vandeleur v. Malcomson*, 17 Ir. C. L. R. 569.

(*y*) Hale, De Jure Maris, 22.

(*z*) See Hale, De Jure Maris, 33; *The King v. Ellis*, 1 M. & S. 652; *The Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Williams v. Wilcox*, 8 Ad. & E. 314; *Malcomson v. O'Dea*, 10 H. L. C.

593; *Scratton v. Brown*, 4 B. & C. 485; *Menzies v. Macdonald*, 2 Macq. H. L. C. 463; *The Mayor, &c. of Truro v. Reynolds*, 8 Bing. 281.

(*a*) Plowd. 154; Dav. 556. See also *The King v. Ellis*, 1 M. & S. 652.

(*b*) *Scratton v. Brown*, 4 B. & C. 485.

(*c*) *Marshall v. The Ulleswater Steam Navigation Company*, 3 B. & S. 732.

(*d*) Holt, 323.

person, and the grant of a pool (e) passes the soil and wear. If the owner of a several fishery grant *suam piscariam*, the entire fishery passes (f). In the case of *The King v. Ellis* (g), Bayley, J., said he doubted very much if the grant of a fishery would convey the soil and everything underneath it, such as all the minerals, though he could conceive that it might pass so much of the soil as is connected with the fishery.

A conveyance of land adjoining a river would pass the fishery in the river, because of common right it might be incident to the soil; but a conveyance of land between high and low water marks would not pass the right of fishing, because *primâ facie* that is in the public (h).

Conveyance of land adjoining a river.

A grant of "oyster-layings" would not of themselves pass the soil, perhaps not even the privilege of getting oysters; because those words only import a privilege of laying oysters there, and it might be doubtful whether a right to take them would be given by those words (i).

Grant of oyster-layings,

A grant of water passes the fishery only and not the soil (k). So the grant by the owner of a river of *separalis piscaria* in it, with livery of seisin *secundum formam chartæ*, passes neither the soil nor the water, but only a particular right, and the livery so made does not enlarge the grant (l), and the profits of the soil for manuring of his ground or ballastage remain in the owner, who has also the property and the use of the water, leaving enough for the subsistence of the fish (m).

—of water.

A grant by the Crown of divers manors, &c., with the appurtenances, "and all waters, fisheries, &c. thereto appendant or parcel thereof," coupled with fines subsequently levied thereof, and of *separalis piscaria* in the

(e) Plowd. 154, 157.

(f) *Alderman de Londres v. Hastings*, 2 Sid. 8.

(g) 1 M. & S. 652, 666,

(h) 4 B. & C. 503.

(i) Per Littledale, J., *Serat-*

ton v. Brown, 4 B. & C. 485, 503, 504.

(k) Plowd. 154; Co. Litt. 4 b.

(l) Co. Litt. 4 b.

(m) 1 Vent. 391.

waters of a navigable tidal river, and a corresponding enjoyment of such a fishery, was held to pass only an incorporeal and not a territorial franchise, without any property in either the soil or the water (*n*).

"If," said Bayley, J., "a fishery only is granted, nothing passes but a right to take the fish, and to use such means as are necessary for that purpose, which is in truth nothing more than a liberty to fish: the grantee has no property in the water, none in the soil (*o*). This would be so in the case of a grant of a particular kind of fishery, as in the case put by Lord Coke (*p*), and although livery of seisin *secundum formam chartæ* were made. But not of a "fishery" generally (*q*). In this last case, however, Cockburn, C. J., dissented from the other members of the court, and on the ground, amongst others, that the above passage from Coke, of the grant of a *several* fishery, was equally applicable in the case of a grant of, not a particular kind of fishery, but of "a fishery" generally. This case shows that the grant of "a fishery" may include the soil.

In *Marshall v. The Ulleswater Steam Navigation Company*, the action was one of trespass on the land of the plaintiff covered with water, being part of *Ulleswater Lake*, and in certain "*several* fisheries" of the plaintiff in certain parts of the same lake, and disturbing and destroying the fish therein. The defendants pleaded that the land was not the land of the plaintiff, that he was not possessed of the several fisheries, or of any of them, and that the parts of the lake in which were the alleged fisheries of the plaintiff were the soil and freehold of divers persons, and that the acts complained of were by the leave and in exercise of the rights of such last-mentioned persons as such owners of the soil and freehold of

(*n*) *The Duke of Somerset v. Fygnell*, 5 B. & C. 875.

(*o*) *Ib.*, 875, 884.

(*p*) *Co. Litt.* 4 b, *supra*.

(*q*) See the grants in *Marshall v. Ulleswater Steam Navigation Company*, 3 B. & S. 732.

the said parts of the said lake as aforesaid. The evidence and admissions in the case were held to show the soil and freehold to be in the plaintiff. The documentary evidence consisted of feoffments with livery of seisin of the "fishery" in question, with a reservation of a quit rent, and upon this chiefly the court held the soil to have passed. Cockburn, C. J., however, doubted whether "upon the grant of a several fishery the ownership of the soil and the right of fishery are to be taken to be united." The feoffment with livery of seisin, coupled with the reservation of a rent, led to the conclusion that the fishery must have been a several one, and presumably included the soil thereof, because such a mode of conveyance is inappropriate to the transfer of an incorporeal right, although, if the livery of seisin were *secundum formam chartæ* (r), would be appropriate, and because a rent cannot be reserved by a common person out of an incorporeal inheritance (s). The plea of the defendants, unlike that of the defendant in *Holford v. Bailey* (t), compelled the plaintiff to prove a title to the soil of the fishery.

An exception of *the* right and privilege of fishing in the waters of a mill, in a grant by the owner of the mill and the waters for the working it, and of a sole fishery in the waters, is an exception of such fishery and not the creation of a new right of fishing (u).

New right of fishing when not created by exception.

When a several fishery is involved in the ownership of the soil an important question, namely, whether it can be claimed by prescription, arises. Such a fishery is of a compound nature, corporeal as to the soil and the water, but as to the mere *jus piscationis* in the water, incorporeal.

Whether a prescription for a several fishery involved in the ownership of the soil be good.

This question may be solved by considering whether the *jus piscationis*, distinct from the soil or land co-

Is, or is not, as the land or the fishery is re-

(r) Co. Litt. 4 b.

(t) 8 Q. B. 1000; 13 Ib. 426.

(s) See *The King v. Ellis*, 1 M. & S. 652, 663.

(u) *Lord Paget v. Miles*, 8 Doug. 48.

garded as the principal or the adjunct.

vered with water, or the soil or land so covered, is to be regarded as the principal subject of the claim, or as the accessory or adjunct of the other. If the *jus piscationis*, apart from the soil, is to be considered as the principal subject of the fishery, and the soil or land covered with the water as the mere adjunct or accessory, the fishery may be claimed by prescription; but if such soil or land is to be considered as the principal subject, and the *jus piscationis* the adjunct or accessory, the fishery cannot be so claimed.

Extent of the ownership of the soil.

The ownership of the soil of such a fishery may be restricted to that portion of the land covered with the water wherein the right of fishing is exercised, or may follow the ownership of the land bordering on, or adjacent to, the land covered with water. But in either case the principle is the same; for it is clear that the soil of land covered with water, together with the water and the right of fishery therein, may be appropriated and belong to a person, whether he have or have not land bordering on, or adjacent to, the land so covered (*x*).

Principal and adjunct between things corporeal and things incorporeal.

Now, although one simple thing corporeal cannot be parcel of or appurtenant to another simple thing corporeal, as land to meadow, meadow to pasture, pasture to wood, land to a messuage (*y*), and although, in general, prescription will not make anything an accessory or incident or adjunct to anything of the same nature and quality (*z*), or that cannot in nature be used with the thing to which it is, or is claimed or intended to be, annexed (*a*), or where the principal thing is not of perpetual subsistence and continuance (*b*); yet a thing corporeal may be parcel of a gross name, and of a thing

(*x*) See *Marshall v. The Ulleswater Steam Navigation Company*, 8 B. & S. 732, 742.

(*y*) *Hill v. Grange*, Plowd. 164, 170; *Hayes v. Bridges*, Ir.

T. R. 390.

(*z*) Co. Litt. 121 a, 121 b, et n. 7.

(*a*) 1 Vent. 387.

(*b*) Co. Litt. 122 a.

compound, as a manor, rectory, honour, and the like(c), and a *portus maris* is *quid aggregatum*, as a manor, and in ordinary presumption includes, not only the franchise, but the very water and soil within the port(d); and things which cannot be claimed directly by prescription may be indirectly so claimed(e), as lands appertaining to an office in fee(f), and by the grant of it they will pass, without livery of seisin(g). So a *portus maris* is treated by Lord Hale as clearly the subject of a claim by prescription or custom, and that such a prescription may carry the soil as well as the franchise(h).

In the case of a fishery, especially of a *several* one, As applied to the difficulty arises as to the meaning of the rule of a several fishery. Lord Coke, "that the appendant or appurtenant must agree in nature and quality with the thing to which it is appendant or appurtenant"(i). Positive incongruity or discordance in quality and nature between the principal and adjunct to prohibit the union is to be the object of the inquiry, rather than positive concordance to warrant such union. There is no striking incongruity of quality and nature between fishery and land; they are not so distinct as to bear no relation to each other, or of such a nature as not to be used together(k); on the contrary, there is a kind of cognation between them, and considerable advantage may be derived, at least to the adjunct, from the connexion. The boats used in the fishery may be fastened to the land, and the fishing utensils and fish may be landed; and in cases where nets are used they may be fastened to the land, and may be also dried on it. Precedents show that there might be a congruous connection and relationship

(c) *Hill v. Grange*; *Hayes v. Bridges*, supra.

(d) Hale, *De Jure Maris*, pt. i.

c. vi.

(e) *Supra*, p. 150.

(f) *Co. Litt.* 121 b.

L.

(g) *Ib.* 49 a.

(h) Hale, *De Jure Maris*, pt. i.

c. vi.

(i) 1 *Inst.* 121 b.

(k) See *Potter v. North*, *Ventr.* 387.

between land and a fishery, with a real advantage arising from the union (*l*).

Hayes v. Bridges.

In *Hayes v. Bridges*, the question arose in an action of replevin. The defendants had distrained, for *damage feasant* (*m*), the vessel of the plaintiff, with its tackle, in the river *Lee* adjoining to and surrounding a piece of land of one Barry there, and in which river they alleged that there had been from time immemorial a certain oyster bed, and of which piece of land the said Barry was seised in fee; and that he and all those whose estate he had in the said piece of land with the appurtenances, for the time being, had from time immemorial *the sole and exclusive right, liberty and privilege of dredging and fishing for oysters* in such part of the said river, *as belonging and appertaining to* the said piece of land. The plaintiff pleaded in bar that the *locus in quo* was a *navigable river*, and the defendants replied by showing the interest of Barry, under whom they made conusance in the *locus in quo*, as stated above. This case, therefore, did not involve, and did not require the determination of, the question, whether a several fishery involves the ownership of the soil.

Shuttleworth v. Le Fleming.

In *Shuttleworth v. Le Fleming* (*n*), it was said *arguendo*, that a several fishery cannot be prescribed for. It imports an ownership in the soil, and therefore cannot be claimed as a *profit à prendre*—is an interest, and not a mere easement. The question there, however, was whether the claim of a *free* fishery by the defendant could be sustained under the Prescription Act (*o*), and not whether the fishery could be claimed by prescription at common law, and the decision was that the claim could not be sustained, as not being such a *profit à prendre* as is within that act.

The extent

A several fishery arising from and incident to the

(*l*) *Hayes v. Bridges*, Ir. T. R. 390.

(*n*) 19 C. B., N. S. 687, 688, 700.
(*o*) 2 & 3 Will. 4, c. 71.

(*m*) See Sulliv. Lect. III.

ownership of the soil involves only so much of the soil as is necessary for, and a substratum of, the fishery (*p*); and although to that extent may be considered as being territorial and not merely incorporeal in its nature, yet the fishery, *jus piscationis*, would seem to be the principal subject and is in the water (*q*), and the soil is merely the accessory or adjunct to the fishery, and, as a corporeal thing, may be appendant or appurtenant to a thing incorporeal (*r*). The soil may be regarded as appendant or appurtenant to the fishery; and, in the case of a several fishery including the soil, either in gross, or appendant or appurtenant, regarding the fishery as distinct from the soil, and as the principal subject, and the soil as the accessory, the fishery may be claimed by prescription, and, as in the analogous case of an office (*s*), or a *portus maris* (*t*), the soil as appendant or appurtenant.

of land in a several fishery involving the soil.

The *jus piscationis* the principal, the land the adjunct.

Such a fishery, not involving the ownership of the soil, is purely and simply incorporeal, can then only be the subject of a grant by deed (*u*), and may therefore be claimed by prescription.

A several fishery without the soil, purely incorporeal.

A free fishery, *libera piscaria*, is the next kind of private fishery. Applied to a fishery, the term "free" is ambiguous. It may mean, either exclusive of all persons (*x*), as in free warren (*y*), or together with, or open to, either some other, or, as in a public common fishery, or a free port, all other persons (*z*), but *primâ facie* means exclusive or several (*a*).

2. A free fishery.

Meaning of "free."

A free fishery, *libera piscaria*, is where the owner or owners of a several fishery, *separalis piscaria* (*b*), and

Definition of it.

(*p*) 3 Ridgw. P. C. 311; 1 M. & S. 666.

(*q*) See 5 B. & C. 876.

(*r*) Co. Litt. 122 a.

(*s*) Co. Litt. 121 b.

(*t*) Sup.

(*u*) *The Duke of Somerset v. Fogwell*, 5 B. & C. 886.

(*x*) 2 Com. 39.

(*y*) Salk. 637; 3 Com. Dig. tit. xxvii., Franchises, s. 18; *Wickham v. Hawker*, 7 M. & W. 13.

(*z*) 10 H. L. C. 619.

(*a*) Per Willes, J., 19 C. B., N. S. 697.

(*b*) Co. Litt. 4 b, 122 a; 13 Q. B. 446; 19 C. B., N. S. 700.

another person, or several other persons, have co-extensive rights of fishing in such several fishery, either as to all, or as to some particular species of fish (*c*), and is more than common of fishery (*d*), and may be, and usually is, created by the grant of the owner of a several fishery (*e*), and therefore may be claimed by prescription (*f*).

Distinction between a "free" and a "several" fishery.

The only substantial distinction, said Willes, J. (*g*), between a "free" and a "several" fishery, is between an exclusive right of fishery, usually called "several," sometimes "free" (used as infree warren), and a right in common with others, usually called "common of fishery," sometimes "free" (used as in free port). A free fishery, however, is not strictly a right in common with others (*h*), and when common of fishery is called free, a public common of fishery, or rather a common fishery, a fishery open to all persons (*i*), is to be understood. In *Shuttleworth v. Le Fleming*, the plaintiff appears to have declared as the owner of the land covered with water, and therefore as including the several fishery as incident to such ownership, and the defendant pleaded "*a free fishery*" in such water, which was an inland lake, but the court said it was not necessary to decide whether those words meant a sole several fishery, or a common of fishery.

As a royal franchise.

Sometimes a free fishery is restricted to the royal franchise of the exclusive right of fishing in a public river (*k*); that is, exclusive of the public generally, but not of the Crown (*l*), the owner *primâ facie* of the soil

(*c*) Co. Litt. 122 a; *Alderman de Londres v. Hastings*, 2 Sid. 8; *Seymour v. Lord Courtenay*, 5 Burr. 2814; 8 Ir. C. L. R. 288; 10 H. L. C. 619; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687. See also *Vician v. Blake*, 11 East, 263.

(*d*) 17 Edw. 4, 7; 7 Hen. 7, 18; F. N. B. 200, n. (*g*).

(*e*) 7 Edw. 4, 7; 7 Hen. 7, 18; 2

Sid. 8; *Little v. Wingfield*, 8 Ir. C. L. R. 279, 288; 11 Ib. 63, 96, 104.

(*f*) Co. Litt. 122 a.

(*g*) 10 H. L. C. 619.

(*h*) Skin. 342; 1 Salk. 687.

(*i*) *Bennett v. Costar*, 8 Taunt. 183.

(*k*) 2 Com. 39.

(*l*) Co. Litt. 122 a.

of such river (*m*). Sometimes such a fishery may mean the right of fishing incident to the ownership of the soil, and is then synonymous with several fishery (*n*); and this would also seem to be the meaning when it is said that a man may have *liberam piscariam* in his own soil (*o*).

A grant or a claim of *liberam piscariam* does not exclude the owner of the soil from fishing (*p*), and therefore when in a public river does not, *primâ facie*, exclude the Crown (*q*). Does not exclude the owner of the soil.

The allegation of *libera piscaria* in the close of another is equivalent to a claim of *separalis piscaria* (*r*). *Liberam piscariam* is sometimes said to be all one with *separalis piscaria*, and not with *communis piscaria*, for *libera piscaria* implies an interest, and the owner of it, in an action of trespass for fishing in *libera piscaria sua*, may plead that it is his franktenement (*s*). Such a fishery, as respects the property in the fish (*t*), may be one with *separalis piscaria* (*u*), and is sometimes said to be the same thing as common of fishery (*x*). But the passage in Lord Coke on which this note is made would seem to mean that free fishery and common fishery are the same, so far only as in neither of them is the owner of the soil excluded from fishing (*y*). When *libera piscaria*, and *separalis piscaria* one.

Libera piscaria, being only the liberty of fishing with others (*z*), is said to give neither the property in, nor the possession of, the fish until they are taken (*a*). Some authorities, however, say that the owner of such a fishery has a property in the fish before they are Whether the owner has a property in the fish before taken.

(*m*) Hale, De Jure Maris.

(*n*) See *Lamb v. Newbiggin*, 1 Car. & K. 549.

(*o*) *Gips v. Wollicot*, 1 Comb. 433, 464; Skin. 678; Com. Dig. Piscary, A.

(*p*) Co. Litt. 122 b.

(*q*) Hale, De Jure Maris.

(*r*) Per Dolben, J., *Smith v. Kemp*, Carth. 285.

(*s*) Skin. 342; 1 Salk. 637.

(*t*) Skin. 677.

(*u*) Holt, Rep. 323.

(*x*) Note 7, Co. Litt. 122 a.

(*y*) Co. Litt. 122 b.

(*z*) Holt, 323.

(*a*) *Upton v. Dawkins*, 3 Mod. 97; *Child v. Greenhill*, Cro. Car. 553; *Smith v. Kemp*, Carth. 285; Holt, 322, *S. C.*

caught (b). These authorities may perhaps be reconciled by considering the former class as having relation to only the owners of such a fishery as amongst themselves, and the latter class as having relation to them on the one hand, and strangers on the other. It is said that the owner of a river in which others have a right of fishing may have an action *quare clausum fregit et piscatus fuit in aqua sua*, and should allege that the defendant *pisces suos cepit*, and may allege the taking of them in *libera piscaria* of such owner (c).

The extent of the right of each person, and how to be exercised.

Inasmuch as in the case of a free fishery the right of each person is coextensive with that of each of the others, it may be exercised independent and regardless of the rights of the others, except so far as that exercise may be or tend to the destruction of the fishery itself, and all of them, when the fishery is in the several fishery of another person, are not only as respects the owner of the several fishery, but as respects one another, having separate and coextensive rights, in a different position to what they would be if the fishery had been granted so as to give them common of fishery; for although, in the case of a grant of *communis piscaria* or of *libera piscaria*, the owner of the soil is not excluded from fishing (d), yet in a free fishery all the owners have equal and coextensive rights; each of them must exercise his right with a due regard to those of the others, and the owner, as in the case of any other common.

3. Common of fishery.
A species of common.

Common of fishery is the last kind of private fishery. Common is defined as a right or privilege of one person or more to take or to use some part or portion of the produce of the lands, waters, woods, &c. of another person (e), either together with such owner of the soil, or with such owner and other persons (f). The word

(b) F. N. B. 88; 2 Com. 40; Salk. 687; 4 Mod. 186, 187; Skin. 342; Com. Dig. Piscary, A.

(c) *Gips v. Wollicot*, Comb. 464.

(d) Co. Litt. 122 a.

(e) 3 Cru. Dig. tit. xxiii., Common, s. 1; 2 Steph. Com. 3.

(f) Co. Litt. 122 a.

common, however, has two meanings, and one person may have right of common and no more (*g*). Common of fishery is treated by the best text writers (*h*) as one species of common. Another text writer, speaking of fisheries generally, doubts whether they are not improperly included in rights of common, and would then refer them to the head of franchises (*i*). But franchises are royal privileges or branches of the king's prerogative, subsisting in the hands of a subject (*k*), and a fishery derived from the Crown, as the exclusive right of fishing in a public river, that is, a navigable tidal river, called a *free* fishery (*l*), or in a district, or in an arm or creek of the sea (*m*), is such a franchise (*n*). A fishery therefore, not so derived, is not properly a franchise.

Common of fishery, *communiam piscariæ*, is the Definition of. right of the owner of land covered with water (*o*), and of another person or several persons, or of several persons, exclusive of such owner, to fish, *jus piscationis*, in common in such waters (*p*), and resembles the case of other commons (*q*); and is called common because it belongs to many (*r*), and cannot be claimed by prescription to exclude the owner of the soil (*s*), and when existing in the several fishery of another will not exclude the owner of such fishery (*t*); and an owner of such right for an estate of freehold might have had an assize (*u*), or if disturbed so that he cannot exercise, or so exercise his right as to

(*g*) Vaugh. 255, 256; 1 Ventr. 395.

(*h*) Ib.; 2 Com. 32, 34.

(*i*) 2 Woodd. 80.

(*k*) 2 Com. 37.

(*l*) Ib. 39.

(*m*) Hale, De Jure Maris.

(*n*) *The Duke of Somerset v. Fogwell*, 5 B. & C. 875.

(*o*) Co. Litt. 4b.

(*p*) Ib. 122 a; *Smith v. Kemp*,

1 Salk. 637; 4 Edw. 3, 48; *Bennett v. Costar*, 8 Taunt. 183; 2 Selw. N. P. 12th ed. 827.

(*q*) Per Holt, C. J., *Smith v. Kemp*, 1 Salk. 637.

(*r*) Co. Litt. 122 a. But see Vaugh. 255, 256; 1 Ventr. 395.

(*s*) Ib. 122 b.

(*t*) 2 Brownl. 64.

(*u*) F. N. B. 180, L.

have the benefit to which he is by law entitled (x), he may have an action on the case (y).

How it differs
from common
of pasture.

A common of fishery differs from a common of pasture as being a profit or benefit from water or land covered with water, by the owner in common of the fishery himself, direct and immediate; but common of pasture is a profit or benefit from the land not direct and immediate, but mediately and indirectly, that is, by and through his commonable animals.

II. A public
or common
fishery.

II. A public or common fishery is the last kind of fishery, and is to be carefully distinguished from a private common of fishery, with which it is sometimes confounded (z).

Definition of.

A public common fishery is the right for all persons to fish in the sea and in the creeks and arms thereof (a), and in navigable tidal rivers (b), but only so far as the tide ebbs and flows (c), that is, on the water and on the sea shore or land when covered with water (d), and the soil is in the Crown (e); and this right extends as well to the taking of shell fish left on the sea shore upon the reflux of the tide, between high and low water mark (f), as mussels and other similar things, as to floating fish (g). By the law of Scotland, the right of fishing in the deep sea, as it is called, that is, where the water is salt,

(x) Litt. 107; 3 Wils. 278; 2 W. Bl. 817, 1233.

(y) 9 Co. 112 b.

(z) See *Bennett v. Costar*, 8 Taunt. 183.

(a) Hale, De Jure Maris, 11, 19, 20; *Nicol v. Blakie*, 22 Court Sess. Ca., 2nd ser. 335, 342, 343.

(b) *Lord Fitzwalter's case*, 1 Mod. 105; *Warren v. Matthews*, 6 Ib. 73; *Salk.* 357; *Carter v. Murcot*, 4 Burr. 2162; *Blundell v. Catterall*, 5 B. & Ald. 293; *Ashworth v. Browne*, 10 Ir. C. R. 421; 16 W. R. 595; *Malcomson v. O'Dea*, 10 H. L. C. 593.

(c) Hale, De Jure Maris; *Ashworth v. Browne*, 10 Ir. C. R.

421, 437; *Murphy v. Ryan*, Ir. L. R., 2 C. L. 143; 16 W. R. 687, S. C.

(d) Per Holroyd, J., *Blundell v. Catterall*, 5 B. & Ald. 301.

(e) See *Murphy v. Ryan*, 16 W. R. 678; Ir. L. R., 2 C. L. 143, S. C. and cases cited.

(f) *Bagot v. Orr*, 2 Bos. & P. 472; 1 A. & E. 357.

(g) See *Duke of Argyll v. Robertson*, 22 Court Sess. Ca., 2nd ser. 261, 265; and on this case, *Duchess of Sutherland v. Watson*, 6 Ib., 3rd ser. 199; *Hall v. Whillis*, 14 Ib., 2nd ser. 324; *Lindsay v. Robertson*, 5 Ib., 3rd ser. 864.

even while the tide is out, belongs to the public at large (*h*).

A public common fishery is in reality, and sometimes is designated, a free fishery; for *primâ facie* the ownership of the soil is in the Crown, and the liberty of fishing is in the Crown and the public with coextensive rights (*i*).

Is a free fishery.

This right of fishing in these places was originally lodged in the Crown (*k*), but by the common law belongs to all the subjects of the realm equally, and has been designated a public common of piscary, or common of fishing (*l*); or, more precisely, a common fishery (*m*), and regarded as a valuable advantage both as a means of subsistence and beneficial employment (*n*), and a source of commerce in all civilized communities. Like other valuable commodities, fish, as well swimming as shell fish, are susceptible of being property (*o*).

Originally in the Crown. By the common law in the public.

This kind of fishery being of common right cannot be claimed by prescription (*p*), but the right of a part of the public may be excluded by one person or more acquiring, in a particular place, either by grant from the Crown before Magna Charta, or by prescription, the right exclusive of the general public (*q*).

Not claimable by prescription.

This kind of fishery cannot be acquired by the public either in non-navigable rivers (*r*), or in an inland lake when the lake is private property (*s*).

A public right of way along the banks of a private river confers no common law right of fishing on the public in connection with such way (*t*).

(*h*) 11 Court of Sess. Ca., 1st ser. 555.

(*i*) Hale, De Jure Maris, pt. i. c. iv; *Seymour v. Lord Courto- may*, 5 Burr. 2814.

(*k*) Hale, De Jure Maris, 11.

(*l*) Ib. 11, 12, 20.

(*m*) *Bennett v. Costar*, 8 Taunt. 183.

(*n*) 5 B. & Ald. 305.

(*o*) 3 Gray's Amer. Rep. 270.

(*p*) *Ward v. Cresswell*, Willes, 265.

(*q*) Hale, De Jure Maris, pt. i. c. iv.

(*r*) See *Rolle v. White*, 16 W. R. 593.

(*s*) *Montgomery v. Watson*, 23 Court Sess. Ca., 2nd ser. 685.

(*t*) *Ferguson v. Shirreff*, 6

Salmon, oyster
and mussel
fishings in
Scotland.

The salmon fishings in the open sea around the coast of *Scotland*, and not merely a right of fishing for salmon (*u*), and also the fishings of oysters and mussel banks or scalps along that coast or sea shore (*v*), are patrimonial rights of and belong exclusively to the Crown; and without the permission or consent of the Crown, expressly or tacitly given, the public cannot interfere with such fishings, but they may be appropriated by the Crown to individual proprietors (*x*). As regards mussel fishings they are property of a peculiar kind. The Crown, making no patrimonial use of them, not letting them, or using them in any way directly, has always *permitted* the public to take mussels where they have not been so appropriated, who consequently are not, but, in the event of taking them after the Crown, determining to take them for its own benefit, has forbidden the taking by the public, might be, wrong-doers (*y*).

The manner
of holding
lands.

The manner of holding lands, as *in alternis vicibus* (*z*), or in common with other persons (*a*), but not in joint tenancy (*b*), because of the *jus accrescendi*, may be claimed by prescription.

A portion of
tithes.

A portion of tithes in the land of another, and *non decimando*, may be prescribed for by a spiritual person (*c*).

Tithes appur-
tenant to a
manor.

So, although in general things spiritual cannot be prescribed for as appurtenant to a temporal inheritance (*d*), yet, under special circumstances, they may be

Court Sess. Ca., 2nd ser. 1868. See also *Montgomery v. Watson*, 28 Ib. 635; *Lloyd v. Jones*, 6 C. B. 81; *Mazwell v. Copland*, 7 Court Sess. Ca., 3rd ser. 142.

(*u*) *Gammell v. Commissioners of Woods and Forests*, 3 Macq. 419.

(*v*) *Duchess of Sutherland v. Watson*, 6 Court Sess. Ca., 3rd ser. 199.

(*x*) *S. C.*; *Duke of Portland*

v. Gray, 11 Court Sess. Ca., 1st ser. 14; *Lindsay v. Robertson*, 7 Court Sess. Ca., 3rd ser. 239.

(*y*) See *Lindsay v. Robertson*, *supra*.

(*z*) See *Welden v. Bridge-water*, Cro. El. 421; Co. Litt. 4 a. On this case, see post.

(*a*) Litt. a. 310.

(*b*) Co. Litt. 195 b.

(*c*) 2 Co. 44.

(*d*) Co. Litt. 121 b.

so claimed, as tithes within a manor as appurtenant to it (*e*).

Things not claimable by prescription (*f*) immediately may be so claimed as accessories to a thing which may be so claimed (*g*), as lands to an office (*h*), which is of perpetual subsistence (*i*), or a franchise to another franchise (*j*).

Things claimable as adjuncts only.

Certain things, however, cannot, in general, be the subject of a claim by prescription. No title by prescription can be made against the laws and statutes of the realm (*k*), except those made in affirmance of the common law (*l*), and not creating any new right, or saved by another statute (*m*). Whatever can be claimed of common right (*n*), as a fishery in the sea (*o*), or in a navigable tidal river (*p*), cannot be claimed, but may be enlarged (*q*), by prescription.

Things not claimable by prescription. None against statute law—exceptions;

—nor for things claimable of common right.

A natural watercourse is neither an interest in, nor a profit out of, land, and, as it commences *ex jure naturæ*, cannot itself be claimed by prescription (*r*), although rights to take or to use the water may be so claimed. A peerage cannot be claimed by prescription (*s*). No prescription can be made for corporeal hereditaments (*t*), or for a part of the soil of land, as coals or other minerals (*u*), clay (*x*), quarries and limestone (*y*), wood (*z*), unless as mere timber the produce of the

A natural watercourse.

A peerage. Corporeal hereditaments.

- (*e*) 2 Rep. 45.
 (*f*) Co. Litt. 114 a.
 (*g*) Ib. 114 b.
 (*h*) Ib. 49 a, 121 b.
 (*i*) Ib. 122 a.
 (*j*) Ib. 114 a, b.
 (*k*) 4 Inst. 86.
 (*l*) Ib. 298.
 (*m*) 2 Ib. 20; 4 Ib. 298.
 (*n*) Bro. Stat. Lim. 43, 44, 47; Hob. 107; Plowd. 545; *Pell v. Towers*, Noy, 20.
 (*o*) Hale, De Jure Maris, pt. i. c. iv.; *Ward v. Crosswell*, Willes, 265.
 (*p*) *Warren v. Matthews*, 6 Mod. 73; Salk. 537.
 (*q*) 2 Inst. 143.
 (*r*) See *Shury v. Piggott*, 3 Bulstr. 339.
 (*s*) 5 Cl. & F. 90.
 (*t*) 2 Com. 264; Bro. Ab. Prescription, pl. 19.
 (*u*) Plowd. 330; *Wilkinson v. Proud*, 11 M. & W. 83.
 (*x*) 1 H. & N. 799.
 (*y*) *McDonnell v. McKinty*, 10 Ir. L. R. 514; 8 Ell. & B. 145. See also *Constable v. Nicholson*, 14 C. B., N. S. 230.
 (*z*) Co. Litt. 4 b; 8 Rep. 136; 11 Ib. 46; *Stanley v. White*, 14 East, 332. See also *Bailey v. Stephens*, 12 C. B., N. S. 90.

soil (*a*), as distinguished from a right to enter on the land and to take the timber, or perhaps turf, as distinguished from the mere right of common of turbarry (*b*), which must be appendant or appurtenant to a house to be spent there (*c*), or a right to dig and to carry away turves (*d*), or bog (*e*), as distinguished from a right to enter and to take them; for the claimant has a better title thereto by possession and visible enjoyment (*f*). A claim to take all the profits of the land would be to the land itself (*g*), and therefore could not be by prescription. In general land acquired *per recessum vel relictionem maris*, cannot be claimed by a subject by prescription (*h*). In *Attorney-General v. The Corporation of London* (*i*), the corporation, although their title to the land in question appears to have been acquired by grant from the Crown (*k*), alleged, but on the principle here stated could not sustain, a title by prescription or immemorial usage.

Welden v. Bridgewater tor
no exception.

The case of *Welden v. Bridgewater* (*l*) may seem at first sight contrary, or an exception to this principle. The case was an action of trespass, and the facts, as found by special verdict, were that within the manor of the plaintiff, and parcel thereof, was a certain meadow containing eighty acres, which from time immemorial had been divided by lot amongst divers persons, *pro captione fœni de herba inde proveniente*, that from time immemorial the plaintiff, and all those whose estate he

(*a*) *Legh v. Hoald*, 1 B. & Ad. 622; *Boyle v. Olpherts*, 8 Ir. E. R. 241; Longf. & T. 320, 331, *S. C.*

(*b*) Co. Litt. 122 a; *Massy v. Gubbins*, Longf. & T. 88.

(*c*) Co. Litt. 121 b; *Massy v. Gubbins*, *supra*.

(*d*) Co. Litt. 4 b.

(*e*) *Boyle v. Olpherts*, *supra*; *Beere v. Fleming*, 13 Ir. C. L. R. 187; 11 L. T. R., N. S. 49, *S. C.*

(*f*) Plowd. 545 a.

(*g*) Co. Litt. 4 b; 3 Wils. 30; *Beere v. Fleming*, *supra*.

(*h*) Hale, *De Jure Maris*, pt. i. c. vi.; *Gifford v. Lord Yarborough*, 3 B. & C. 91; 5 Bing. 163.

(*i*) 12 Beav. 8; 2 Macn. & G. 247.

(*k*) See *The Banne Fishery case*, Dav. 55; *Bulstrode v. Hall*, 1 Sid. 148.

(*l*) Cro. El. 421.

had, used to have allotted to them yearly out of the said meadow thirteen acres, that the *locus in quo* was allotted to the plaintiff, and that the defendant entered and cut down the grass, and the question was whether the action could be maintained, and the court held that it could; and according to the report of the case in Croke, the court is said to have treated the plaintiff as having not a mere *profit à prendre* in the thirteen acres allotted to him, but a freehold interest in the land itself. According to the report of the same case by Moore (*m*), who does not state the facts, the plaintiff was considered as having only the crop and vesture of the land, and being in possession of the land itself, the right to such crop and vesture was sufficient to enable him to sustain the action (*n*). But both Rolle (*o*) and Lord Coke (*p*) treat the case as an authority for the proposition that the plaintiff had a moveable *fee simple* in the lands yearly allotted to him, and, as the claim was by prescription, for the proposition that *land* may be so claimed. The only question in the case, however, was whether trespass was maintainable, and the plaintiff having possession of the *locus in quo*, and such a right as is stated in the special verdict, he was clearly entitled to maintain the action (*q*). Beyond this question, therefore, the case would seem to be an authority for only the proposition that the crop and *vesturam*, or *herbagium terræ*, may be claimed by divers persons *in alternis vicibus* by prescription (*r*).

An exception to the rule that land cannot be claimed by prescription is the soil of the sea shore and of all acquisitions, *per projectionem* or *alluvionem*, of all arms of the sea, creeks and navigable rivers, and, in one particular instance, land acquired by *recessum* or *relic-* Exception.

(*m*) Mo. 302.

(*n*) See also Co. Litt. 4 b.

(*o*) 1 Abr. 829.

(*p*) Co. Litt. 4 a.

(*q*) Co. Litt. 4 b.

(*r*) See also Ib. 122 a.

tionem or *per obstructionem maris* (*s*), and may be claimed as parcel of the manor of a subject (*t*), and by prescription (*u*).

The exclusive use of land as a mere easement.

But although land itself, as such, cannot be claimed by prescription and cannot be appurtenant to land (*v*), yet the exclusive use of land, as a mere easement, and as distinguished from the land itself, may be so claimed. For although a grant of the exclusive use of land may be equivalent to a grant of the land itself, yet, in support of the intention, a grant of such use as appurtenant to other land may be construed as a grant of a mere easement and as so appurtenant (*x*), and therefore the exclusive use of land as such an easement would seem to be claimable by prescription.

Things not grantable.

Prescription presupposes a grant, and therefore things which cannot be granted, as things which are uncertain (*y*), or which cannot have a lawful beginning (*z*), cannot be claimed by prescription, for in neither case can a grant of them be presupposed.

Franchises and liberties not seisable as forfeited.

Such franchises and liberties as cannot be seised as forfeited, before the cause of forfeiture appear of record, cannot be claimed by prescription, because prescription, being but an usage *in pais*, cannot extend to such things as cannot be seised, nor had, without matter of record, as to the goods of traitors, felons, &c. (*a*); but may be so claimed when incidents to a thing which may be so claimed, as a county palatine (*b*).

Rights which cannot be made appur-

A right which cannot be made appurtenant can be claimed by conveyance only, and cannot be claimed by

(*s*) Hale, *De Jure Maris*, pt. i. c. vi. 31, 32, 33.

(*t*) Hale, *De Jure Maris*, pt. i. c. vi.; *Bulstrode v. Hall*, 1 Sid. 148; *Constable's case*, 5 Rep. 106, 107; *Ex parte Lord Greydir*, 2 Mad. 281; *The King v. Lord Yarborough*, 3 B. & C. 91; 5 Bing. 163, *S. C.*

(*u*) Hale, *De Jure Maris*, pt. i. c. iv., vi.; 1 Sid. 148; Doug. 441;

Com. Dig. Navigation, A, B; Dav. 56 b.

(*v*) Co. Litt. 121 b; *supra*, p. 192.

(*x*) See *Capel v. Buzard*, 6 Bing. 150.

(*y*) Dav. 83 b; *Blewett v. Tregonning*, 3 A. & E. 554.

(*z*) *Supra*.

(*a*) Co. Litt. 114 a.

(*b*) *Ib*.

prescription, not even in respect of ownership, and *à fortiori* in respect of mere occupancy. Therefore where the occupier of a close alleged a prescription in the owner of the close and all those whose estate he had, and his and their tenants, the right to enter upon the land of another person adjoining such close, for cutting and carrying away and to cut and carry away and convert to his and their own use the trees and wood growing on the said land as to the said close appertaining, the right was held to be a right in gross, and a right to be exercised absolutely, but not on but wholly irrespective of such close, and therefore incapable of being made appurtenant to it, and of being claimed by prescription (c); although a claim of a profit as appurtenant to, and to be used on, the land of the claimant is valid (d), and may be so claimed.

tenant, and claimable by conveyance only.

A prescriptive right cannot be pleaded by way of, or as, a customary one (e). Whether, in respect of the same land, a prescription can coexist with a custom for the same right is questionable (f).

Pleading and co-existence of prescriptive and customary rights.

(c) Co. Litt. 121 b; *Bailey v. Stephens*, 12 C. B., N. S. 91.

(d) *Douglas v. Kendal*, Cro. Jac. 256.

(e) *Baker v. Bearman*, W. Jones, 367; *Blewett v. Tregonning*, 3 Ad. & E. 554.

(f) Vide *supra*, p. 135.

CHAPTER III.

CUSTOM AS DISTINGUISHED FROM PRESCRIPTION COM-
MONLY SO CALLED.

SECTION I.

The Nature and Requisites of Custom generally.

Custom, what. CUSTOM, in intendment of law, is such usage as has obtained the force of law, and is, indeed, a binding law for such particular place, persons and things as it concerns; and such custom cannot be established by grant of the Crown (*a*), or by act of parliament, but is an unwritten law, and made by the people only of such place where the custom prevails. For where people find any act to be good and beneficial, and apt and agreeable to their nature and disposition, they use and practice it from time to time, and so, by frequent iteration and multiplication of that act, custom is made, and being used from time immemorial obtains the force of a law. And so the rule (*b*) is true that no law obliges a people, except it be made by the consent of the people. For consent may be expressed as well by deed as by word, and that which is expressed by deed is stronger than that which is expressed by word, and that which is expressed by several acts, and continual acts of the same kind, is custom. And so, briefly, custom is a reasonable act, iterated, multiplied and continued by people from time immemorial (*c*).

(*a*) 49 Edw. 3, 8a.

(*b*) 44 Edw. 3, 19.

(*c*) *The Tanistry case*, Dav. 28b, 81b; *Clarkson v. Woodhouse*, 5 T. R. 412, n.; *Lockwood*

v. Wood, 6 Q. B. 50, 64; *Duke of Beaufort v. Smith*, 4 Ex. 450; *Bremner v. Hull*, 12 Jur., N. S. 648.

The usages in mineral districts, not alone Cornwall, but the King's Field in Derbyshire, Dean Forest, and others, have their's; and they will be allowed, their reasonableness being tried by tests, not the same in fact, but in principle as are applicable to other local usages, by a reference to their history, origin, and the local peculiarities on which they are to operate (*d*).

Usages in mineral districts.

Custom does not commence by grant, and extends to all interests and estates whatsoever (*e*); and every custom, as distinguished from prescription commonly so called, must rest on usage from time immemorial (*f*), must be lawful in itself (*g*), need not be intended to have a lawful beginning (*h*), and inquiry into the origin of a custom is unnecessary, and, being reasonable and beneficial, will prevail against the common law (*i*). It is in effect the common law within that place to which it extends, though contrary to the general law of the realm (*j*). In some modern cases where a claim has been made by custom, the legal origin of the custom has been spoken of as an essential element of it, making no distinction between claims by custom, and those by prescription as distinguished from custom (*k*). This legality of the origin of a custom, however, is to be understood, not as to it being in conformity with the general law, but as to it being legal in its own nature.

How it commences and to what it extends.

(*d*) See *Rogers v. Brenton*, 10 Q. B. 26, 63.

(*e*) Per Coke, C. J., *Rowles v. Mason*, 2 Brownl. 192, 198.

(*f*) Co. Litt. 110 b, 113 b; Dav. 32 a; *Elwood v. Bullock*, 6 Q. B. 383; *Ib.* 66; *Marquis of Anglesey v. Lord Hatherton*, 10 M. & W. 218; *Shephard v. Payne*, 12 C. B., N. S. 414; 16 *Ib.* 132, on error; *Mounsey v. Ismay*, 1 H. & C. 729; *Duke of Portland v. Hill*, 12 Jur., N. S. 286; *Bryant v. Foot*, 7 B. & S. 725; affirm. on error, L. R., 3

Q. B. 497, 37 L. J., Q. B. 207.

(*g*) Dav. 32 b.

(*h*) *Gateward's case*, 6 Co. 59.

(*i*) *Noble v. Durrell*, 3 T. R. 271; 6 Q. B. 64; *Bremner v. Hull*, 12 Jur., N. S. 648.

(*j*) *Lockwood v. Wood*, 6 Q. B. 50, 64.

(*k*) See *Shephard v. Payne*, 12 C. B., N. S. 414; 16 *Ib.* 132; *Bryant v. Foot*, 7 B. & S. 125; affirm. on error, L. R., 3 Q. B. 497; *Bremner v. Hull*, 12 Jur., N. S. 648.

Must be reasonable.

Above all things, every custom must also be reasonable (*l*), as in the case of tin-bounding in Cornwall (*m*), which is a direct interference with the law of property, and if claimed on a mere annual renewal of the bounds without a *bonâ fide* working of them, renders the custom unreasonable.

When so.

A custom is reasonable when it is not prejudicial to the commonwealth, nor to the present interest of any particular person, or even prejudicial to such interest, but for the benefit of the commonwealth in general (*n*); or even when it involves a partial and limited obstruction to a public right, both as to extent and duration, the public during such obstruction deriving a benefit which can be considered as equivalent (*o*).

Meaning of being void when not so.

When it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom (*p*). If the custom be unreasonable the prevalence of the use is to be referred to the ignorance or carelessness of those whose property is affected by the exercise (*q*).

Reasonable as between the lord of a manor and the copyholders.

There are, however, many rights well known in manors, and capable of being supported, which arise entirely out of, and are dependent upon, the peculiar

(*l*) *Bell v. Wardell*, Willes, 202; *Broadbent v. Wilks*, Ib. 360; *Wilson v. Willes*, 7 East, 121; *Harbin v. Green*, Hob. 189; *Drake v. Wigelsworth*, Willes, 657; *Noble v. Durrell*, 3 T. R. 271; *Richardson v. Walker*, 2 B. & B. 827; *Hilton v. Earl Granville*, supra; *Blackett v. Bradley*, supra; *Rogers v. Brenton*, 10 Q. B. 26; *Wakefield v. The Duke of Buccleugh*, 15 W. R. 783; *The Marquis of Salis-*

bury v. Gladstone, 6 Ex., N. S. 123; affirm. in D. P., 9 H. L. C. 692.

(*m*) *Rogers v. Brenton*, supra. (*n*) Dav. 32 b.

(*o*) *Elmood v. Bullock*, 6 Q. B. 383.

(*p*) Per Lord Cranworth, C., *Marquis of Salisbury v. Gladstone*, 9 H. L. C. 692, 701.

(*q*) Per Lord Wensleydale, 8 C. 705.

relation between the lord and the copyholder (*r*), and the meaning of the word "reasonable," when applied to a custom regulating that relation, is not easy to define. That relation must have had its origin in remote times between the lord as absolute owner of the whole manor in fee simple, and those whom he was content to allow to occupy portions of it as his tenants at will. The rights of these tenants must have depended in their origin entirely on the will of the lord, and it is hard to say how any stipulations regulating such rights can, as between the tenant and the lord, be deemed void, as being unreasonable, *cujus est dare ejus est disponere*. Whatever restrictions, therefore, or conditions the lord may have imposed, or whatever rights the tenants may have demanded, all were within the competency of the lord to grant, or of the tenants to stipulate for. And if it were possible to show that before the time of legal memory any lawful arrangement had been actually come to between the lord and his tenants, as to the terms on which the latter should hold their lands, and that arrangement had been afterwards constantly acted on, I do not see how it could ever be treated as being void because it was unreasonable (*s*).

But as between the lord of the manor on the one hand and the copyholders, either individually or collectively, on the other, a right claimed by the lord by a custom may be so prejudicial to the copyholders (*t*) as to be unreasonable; as if the custom may deprive the tenant of the whole benefit of the land, it cannot be presumed that he at first would come to such an arrangement (*u*). So a custom which goes in destruction of the thing in which the right is claimed is unreasonable; as a custom of a manor for the lord to grant from

When unreasonable as to the tenants.

(*r*) Per Erle, C. J., *Bailey v. Stephens*, 12 C. B., N. S. 91, 109.

(*s*) Per Lord Cranworth, *Margis of Salisbury v. Gladstone*, 9 H. L. C. 692, 701.

(*t*) *Broadbent v. Wilks*, Willes, 360; *Hilton v. Earl Granville*, supra.

(*u*) *Broadbent v. Wilks*, supra.

time to time such portions of the waste as he, in his discretion, should think fit, could not be supported, because it would be in destruction of the right of common of the commoners existing from time immemorial (x).

When reasonable as to them.

But an immemorial usage for the lord to dig clay upon the waste may be valid (y); for by digging for clay, he takes from the land a product of a particular species, but the land afterwards remains capable of yielding food fit for the feeding of cattle. Indeed, it frequently happens that land, besides the support which it yields for the food of man or of cattle, has within it some valuable product, as marl or limestone, which it is desirable for the owner of the waste to obtain; and it is not unreasonable that the lord of a manor, when he grants rights on that land, should reserve to himself the right of taking such marl or limestone. But when he takes them, he does not permanently deprive the commoners of that benefit which they are entitled to derive from the surface of that part of the land from which the marl or limestone is so taken. The nature of the subject which is taken from the earth shows that such reservation was not unreasonable. The exercise of such right will no doubt interfere with the privilege of the commoners during the time the produce is taken from the earth, and until the surface reproduces pasturage, but they are not wholly and permanently deprived of the right (z). A similar usage for a tenant, restricted to his own tenement, but in relation to it unlimited, is also reasonable (a).

When unreasonable as to other tenants and the lord.

On the other hand, a customary right claimed by a tenant may be so prejudicial to, not only the other tenants but also the lord, as to be unreasonable; as being destructive of the thing in which the right is claimed.

(x) *Arlett v. Ellis*, 7 B. & C. 846.

Ellis, 7 B. & C. 846, 366.

(y) *Bateson v. Green*, 5 T. R. 411.

(a) *The Marquis of Salisbury v. Gladstone*, 6 Ex., N. S. 123; affirm. in D. P., 9 H. L. C. 692.

(z) Per Bayley, J., *Arlett v.*

Thus a custom that all the customary tenants having gardens parcel of their customary tenements might dig and take away from the waste turf to be used on the tenements for the improvement thereof, without limit as to the time of taking it, or the quantity to be taken, is bad in law as being indefinite and uncertain, and also destructive of the common (*b*).

But a customary right claimed by a copyholder affecting his own tenement only, although prejudicial to the lord, but not to the other copyholders, may be reasonable; as a custom for a copyholder of inheritance without licence to get clay without limit out of his tenement for making bricks to be sold off the manor (*c*).

Reasonable although prejudicial to the lord but not to other tenants.

Every custom must also be certain in its nature (*d*), or reducible to a certainty (*e*), as to the persons for whom (*f*), and the place where it is alleged (*g*). The properties of every valid custom are fully and admirably expounded and illustrated in the great case of Tanistry in Ireland (*h*).

Must be certain.

Customs, especially where they derogate from the general rights of property, must be construed strictly (*i*).

Construed strictly.

SECTION II.

Who may claim by Custom.

Custom is for many persons if all but one be not dead (*k*), and generally as an undefined class, but of a particular locality, as copyholders of a manor (*l*), the

Undefined class of persons of a particular place.

(*b*) *Wilson v. Willes*, 7 East, 121; *Arlett v. Ellis*, 7 B. & C. 346.

(*c*) *The Marquis of Salisbury v. Gladstone*, 6 Ex., N. S. 123; affirm. in D. P., 9 H. L. C. 692.

(*d*) *Blewett v. Tregonning*, 8 Ad. & E. 554.

(*e*) *Bac. Ab. Customs*, E.

(*f*) *Selby v. Robinson*, 1 T. R.

758.

(*g*) *Bennett v. Read*, 1 Anstr. 822, n.

(*h*) *Dav. Rep.* 32 *a et seq.*

(*i*) *Walker v. Richardson*, 2 B. & C. 827; *Rogers v. Brenton*, supra.

(*k*) *Rowles v. Mason*, 2 Brownl. 192, 198.

(*l*) *Co. Litt.* 113 b.

inhabitants of a place (*m*), and to be exercised there (*n*), and not for all persons generally, for that would be the common law and not custom (*o*). And the class cannot claim otherwise, not by prescription as distinguished from custom, for prescription presupposes a grant, and they are incapable, as such, of taking by grant (*p*), except from the Crown (*q*); and the 2 & 3 Will. 4, c. 71, does not enable them so to claim (*r*). And the custom being fixed to the land, except perhaps in the case of a claim by custom to a *modus decimandi* (*s*), all the occupiers and possessors of the land may have advantage of the custom (*t*).

Surveyors of
highways.

In *Padwick v. Knight* (*u*), which was an action of trespass, the defendants pleaded that the close of the plaintiff was parcel of certain waste land within the parish; that from time immemorial all persons residing within the parish, whose office or duty might require them from time to time to cause all highways lying within the parish to be repaired, had right to enter the said close and to get and carry away therefrom stones, gravel, &c. for repairing the said highways as occasion required; that the defendants were duly appointed surveyors by the inhabitants of the said parish residing there, and that the duty of the defendants as such surveyors required them to cause the said highways to be repaired as occasion should require. The defendants

(*m*) *Gateward's case*, 6 Co. 60; *S. C.*, nom. *Smith v. Gatewood*, Cro. Jac. 152; *Day v. Savadge*, Hob. 85; Vent. 390; Co. Litt. 110 b; Co. Cop. s. 38; *Abbot v. Weekly*, 1 Lev. 176; 4 Rep. 32; Cases Temp. Hardw. 293; Kit. 209, 210; 5 B. & Ald. 279; 2 H. Bl. 898; *Tyson v. Smith*, 9 Ad. & E. 406; *Earl Coventry v. Willes*, 12 W. R. 127; 5 B. & Ald. 729; 8 Hurl. & C. 497.

(*n*) *Gateward's case*, 6 Rep. 59.

(*o*) Co. Litt. 110 b. See *Tyson v. Smith*, supra.

(*p*) Bro. Abr. Custom, pl. 46; *Lockwood v. Wood*, 6 Q. B. 50; supra.

(*q*) 6 Q. B. 62; supra.

(*r*) See 7 Ex. 859.

(*s*) See *Bennett v. Roade*, 1 Anstr. 322, 330.

(*t*) 7 Edw. 4, 26; 18 Edw. 4, 3; *Weekly v. Wilman*, 1 Lord Raym. 405, 406; *Gravesend case*, 2 Brownl. 177.

(*u*) 7 Ex. 854.

also pleaded that the close was waste land contiguous to and next adjoining to the sea shore between high water mark and low water mark, that there were from time immemorial divers ancient public highways within the parish, and that there was within the parish an immemorial ancient *custom* to enter, &c. and to get and carry away, &c. as in the former plea; and these pleas were held bad, but on what grounds the report does not state. Alderson, B., thought the plea wrong in form, and Martin, B., seemed to think that such a right might be good by prescription. The *ratio decidendi* seems to be that the claim could not be sustained by prescription as distinguished from custom, because being in effect by inhabitants of a parish they cannot so claim (*x*); nor by custom, because they cannot so claim an interest *in alieno solo*, and the claim was of that nature. The claim was also invalid as being unreasonable, because indefinite and uncertain, as well as destructive of the subject in which the right was claimed (*y*).

But if the thing claimed be in its nature claimable by prescription only, but they who have it and ought to have it in justice, cannot prescribe for it from necessity, there, in order that the undoubted right may not be defeated, they shall be allowed to claim it by custom. For that which is matter of interest, as the taking a profit from the soil, must for its existence have some person in whom it is; and a flux body, which has no entirety or permanence, cannot take that interest which by the supposition is immemorial and permanent, because, from its nature, it cannot prescribe for anything (*z*). Necessity, however, will control this and will allow the claim to be supported by custom, as in the case of the lord of a manor and his copyholders who claim common in *his wastes* (*a*), and of persons entitled in Cornwall to

Persons having right but unable to prescribe may claim by custom.

(*x*) Vide *supra*, p. 142.

(*y*) Vide *supra*, p. 211.

(*z*) *Day v. Savadge*, Hob. 85.

(*a*) See *Gateward's case*, 6 Co. 59.

dig and take tin and tin-ore on the land of another, paying a customary proportion of the ore raised on a *bond fide* working of the land for mining purposes (*b*).

Claiming
virtute officii.

In some cases, however, a person certain may claim by custom and *virtute officii* (*c*), as for fees of office (*d*), or a marriage fee (*e*), and in some cases a person certain can claim by custom only (*f*).

By class of
persons in one
place to take
a thing in
another.

In *Blewett v. Tregonning* (*g*), Littledale, J., enquired, *arguendo*, whether there was any case in which the inhabitants of one parish had established a custom to take a thing in another. In *Gateward's case* (*h*), such a custom was alleged, but was held to be bad as repugnant in itself. It has also been held that burial fees (*i*) and marriage fees (*k*) cannot be claimed for the performance of the ceremony by another person in any other church or parish than that of the claimant.

SECTION III.

What may be claimed by Custom.

Easements.

The thing claimed by custom must be, in general, either a mere easement *in alieno solo* (*l*), or such an easement together with an exemption from all payment for the exercise of it, as the easement of going on land and pitching stalls on it on market days without paying anything for the use of the soil (*m*), or in the nature of

(*b*) *Rogers v. Brenton*, 10 Q. B. 26.

(*c*) See *Padwick v. Knight*, 7 Ex. 854.

(*d*) *Shephard v. Payne*, 12 C. B., N. S. 414; 16 Ib. 132; S. C. on error.

(*e*) *Bryant v. Foot*, 7 B. & S. 725; affirm. on error, L. R., 3 Q. B. 497; 37 L. J., Q. B. 217.

(*f*) *Fviston's case*, 4 Rep. 81; *Gateward's case*, 6 Ib. 60.

(*g*) 3 Ad. & E. 554.

(*h*) 6 Rep. 60; Cro. Jac. 152, S. C.

(*i*) *Topsall v. Ferrers*, Hob. 175.

(*k*) *Richards v. Dovey*, Willes, 622.

(*l*) *Fviston's case*, 4 Rep. 81; *Gateward's case*, 6 Ib. 60; 2 Brownl. 178; *Manning v. Wasdale*, 5 Ad. & E. 758; *Race v. Ward*, 4 E. & B. 702.

(*m*) See *Lockwood v. Wood*, 6 Q. B. 81.

a discharge or exemption of the claimant *in suo solo* (n), or may be not even a mere easement (o), but only an excuse for a trespass, as common *causa vicinagii*, or the mutual right of the owners of adjoining open lands for their respective cattle to stray into the lands of each other, and, whilst so straying, to feed thereon without such owners being liable in damages for the trespass (p).

A *modus decimandi* may be claimed by custom distinguished from prescription, as well as by prescription (q). And the custom is not annexed to the lands which it covers, but exists in a notion of law independent of the lands, by force of the custom prevailing in the district, and is as necessarily attached to the certainty of district, as prescription for a *modus* is to a certainty of the particular lands (r).

A heriot may be claimed by custom in respect of tenements within a manor, upon the death of every free tenant holding either for an estate in fee simple, or for a less estate (s).

Marriage fees (t) and burial fees (u), although not of fixed amount before the time of legal memory, for usage may fix the amount, and *id certum est quod certum reddi potest*, yet being reasonable, may be so claimed (x). But the claimant must be liable to the obligation of performing the ceremony, and therefore he cannot claim them for the performance of it in any other church or

(n) *Fviston's case*, supra; *Gateward's case*, supra; *Shelton v. Montague*, Hob. 118.

(o) 10 Q. B. 635.

(p) Vide supra, p. 152; *Jones v. Robin*, 10 Q. B. 581; *Pritchard v. Powell*, Ib. 589; *Clarke v. Tinkler*, Ib. 604.

(q) Vide supra; *Shelton v. Montague*, Hob. 118.

(r) *Bennett v. Read*, 1 Anstr. 322, 330.

(s) *Damerell v. Protheroe*, 10

Q. B. 20, and cases cited.

(t) *Richards v. Dovey*, Willes, 622; *Bryant v. Foot*, 7 B. & S. 725; 8 Ib. on error.

(u) *Topsall v. Ferrers*, Hob. 175.

(x) See *Shephard v. Payne*, 12 C. B., N. S. 414; 16 Ib. 132; *Mill v. The Mayor, &c. of Colchester*, 16 L. T. R., N. S. 625, and cases there cited; *Lawrence v. Hitch*, L. R., 8 Q. B. 521. But see *Bryant v. Foot*, supra.

parish than his own, by another person, for that would be against reason (*y*).

Official fees of registrar.

Fees attached to the office of registrar may be so claimed, and may be presumed to be immemorial fees, if that presumption be necessary to give them validity, unless the contrary be proved (*z*). And as a fee need not be of a fixed and ascertained, but may be of reasonable, amount, such fees, notwithstanding variations in them during the period they were proved to have been paid, were held sustainable in law as reasonable (*a*). But where a marriage fee was claimed by custom, and the payment of it was proved for nearly thirty years past, the claim was held invalid on the ground of being "rank," or so large that it could not possibly have existed at the commencement of the time of legal memory (*b*). Blackburn, J., however, differed from the rest of the court as to the applicability of the doctrine of rankness to such a fee (*c*).

Common *causa vicinagii* by classes of persons.

Common *causa vicinagii*, when not between two or more individual proprietors where lands are not subject to common rights, or where there are not commoners on either side, for then the claim is by prescription as distinguished from custom (*d*), but between classes of persons, as inhabitants of different districts, or the tenants of adjoining manors, is matter of immemorial custom as distinguished from prescription. For where the wastes of adjacent manors lie open together, the lords in respect of their ownership of the soil of the wastes, the copyholders in respect of their customary rights and the freeholders in respect of their prescriptive

(*y*) *Topsall v. Ferrers*, Hob. 175; *Richards v. Dovey*, supra.

(*z*) *Shephard v. Payne*, 12 C. B., N. S. 414; 16 Ib. 132, on error.

(*a*) Ib. 12 C. B., N. S. 414. But see *Bryant v. Foot*, 7 B. & S.

725, 756.

(*b*) *Bryant v. Foot*, supra.

(*c*) See also *S. C.* on error, 37 L. J., Q. B. 217; L. R., 3 Q. B. 497; *Lawrence v. Hitch*, Ib. 529.

(*d*) Vide supra.

rights over the wastes, have some common interest in the stocking of those wastes ; and it may well be that a general custom and usage for the convenience of all parties may have existed from time immemorial as to straying of cattle, which custom and usage would not have had its origin in any actual contracts, it not being at all probable that many persons with such different interests should have entered into actual contracts on the subject, but in a tacit acquiescence of all for their mutual benefit (*e*). And the common may be claimed in respect of a single copyhold, or by a single copyholder only, or by one copyholder in one waste of a manor and by another copyholder in another waste of it (*f*), but not perhaps in respect of one of several tenements in the manor (*g*). And this common does not begin only by the bare custom, but with it and the consideration that the other tenants shall have common in like manner in his land (*h*), or the obligation of one owner is the consideration for that of another (*i*).

The liberty of fishing in a creek or arm of the sea, or in a district of the sea, exclusive of such liberty in the public in general, may be acquired by custom as well as by prescription (*k*).

Liberty of fishing in the sea.

Although, as we have seen (*l*), land cannot be claimed directly by prescription properly so called, it may be claimed by custom as distinguished from prescription. There is a general custom by which lands, from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property

Land acquired per alluvionem.

(*e*) *Jones v. Robin*, 10 Q. B. 581. See also *Pritchard v. Powell*, *ib.* 589; *Clarke v. Tinker*, *ib.* 604.

(*f*) See *Fbiston's case*, 4 Rep. 31 b.

(*g*) Per Patteson, J., 10 Q. B. 602.

(*h*) 6 Hil. T., 13 Hen. 7, 13, 3; 10 Q. B. 624.

(*i*) 10 Q. B. 630.

(*k*) Hale, *De Jure Maris*, pt. i. c. iv. See also *Blundell v. Carterall*, 5 B. & Ald. 268.

(*l*) *Ante*, p. 208.

of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the king. Such a custom is established by satisfactory legal evidence (*m*).

Not derelict
lands.

Derelict lands, however (*n*), with some few exceptions (*o*), cannot be claimed by custom. A thing which either cannot be claimed by prescription because a grant of it cannot be made (*p*), or is claimable by prescription only, but the claimants are incapable of supporting their right in that mode (*q*), may be claimed by custom.

Nor an interest
in *alieno solo*
claimed by a
class of per-
sons.

An interest in *alieno solo* (*r*), especially when claimed by a class of persons as inhabitants (*s*), or the copyholders of a manor for such an interest beyond the limits of the manor (*t*), unless perhaps where the custom gives to the owner of the soil for the use of it a certain profit (*u*), cannot be claimed by custom.

Common
causa vicini-
agii not such
an interest.

Common *causa viciniagii* (*x*) might seem at first sight to be an interest in *alieno solo*, and therefore not claimable by custom. But, as just shown, is neither such an interest, nor even a mere easement, but is only an excuse for a trespass and is so claimable.

(*m*) Hale, *De Jure Maris*, pt. i. cc. iv., vi.; *Gifford v. Lord Yarborough*, 5 Bing. 168.

(*n*) *Ib.*

(*o*) Hale, *De Jure Maris*, 31, 32, 33.

(*p*) See *Shephard v. Payne*, 12 C. B., N. S. 414; 16 *Ib.* 132; *Bryant v. Foot*, 7 B. & S. 725, *supra*, p. 216.

(*q*) *Rogers v. Brenton*, 10 Q. B. 26.

(*r*) *Baker v. Brereman*, Cro. Car. 418; *Gateward's case*, *supra*; *Potter v. North*, Ventr. 383; *Grimstead v. Marlome*, 4 T. R. 717; *Rex v. Churchill*, 4 B. & C. 755; 6 D. & R. 785, *S. C.*; *Blewett v. Tregonning*, 8 Ad. & E. 554; *Willingale v. Maitland*,

12 Jur., N. S. 932; *Lloyd v. Jones*, 6 C. B. 81; 16 L. T. R., N. S. 629; *Att.-Gen. v. Matthias*, 4 Jur., N. S. 628.

(*s*) *Bland v. Lipscomb*, 4 E. & B. 713, n.; *Constable v. Nicholson*, 14 C. B., N. S. 230; 10 Q. B. 60; *Race v. Ward*, 4 E. & B. 702; *Lloyd v. Jones*, 12 Jur. 657; 2 Brownl. 178; *Murphy v. Ryan*, 16 W. R. 678; *Lockwood v. Wood*, 6 Q. B. 50; *Padwick v. Knight*, 7 Ex. 854.

(*t*) *Gateward's case*, 6 Rep. 60.

(*u*) See *Tyson v. Smith*, 9 Ad. & E. 406; *Lockwood v. Wood*, 6 Q. B. 50; *Rogers v. Brenton*, 10 *Ib.* 26.

(*x*) *Vide supra*.

As exceptions to the rule as to an interest *in alieno* Exceptions.
solo may be mentioned the case of copyholders claiming rights of common against the lord in the wastes of the manor (y), or sole and several pasture excluding him (z), and the right of fishing in a creek or an arm of the sea, or in a district of the sea, exclusive of the general public (a).

(y) See *Gateward's case*, 6 Rep. 60; *Grimstead v. Marlowe*, 4 T. R. 717; *Rex v. Churchill*, 4 B. & C. 755; 6 D. & R. 685, *S. C.*

See also Sect. I. of this Chap.
 (z) *Hoskins v. Robins*, 2 Saund. 324.
 (a) *Supra*, p. 219.

CHAPTER IV.

THE PROOF OF PRESCRIPTION AT COMMON LAW.

User the primary evidence,

PRESCRIPTIVE rights, and especially those in and over land, although having, as well as the land itself, the protection of law for their enjoyment by the persons entitled to them (*a*), seem to require, by reason of their nature, that protection more than the land itself. These rights being based on and preserved by user, user, besides its importance as an aid which may be resorted to for the interpreting of ancient deeds (*b*), is the primary evidence of the existence of the right, and the continued user of the right, in modern times, for a certain length of time raises a presumption in law of the previous existence of the right for an antecedent period extending as far back as the time of legal memory (*c*); and the longer the user the stronger the right (*d*). To hold otherwise, long-continued usage would impair instead of confirm the security of rights (*e*). In this way these rights are referred to a legal origin (*f*).

(*a*) 6 Bing. 163.

(*b*) Hale, *De Jure Maris*, 33; *Wild v. Hornby*, 7 East, 199; *Chad v. Tilsed*, 2 Brod. & B. 403; *Calmady v. Rowe*, 6 C. B. 861; *The Duke of Beaufort v. The Mayor, &c. of Swansea*, 3 Ex. 413; *The Mayor of Exeter v. Warren*, 5 Q. B. 773; *Att.-Gen. v. Jones*, 2 H. & C. 347; *Little v. Wingfield*, 11 Ir. C. L. R. 63; *Baird v. Fortune*, 4 Macq. 127, 149; *Rowe v. Brenton*, 3 Man. & Ry. 133.

(*c*) *Chad v. Tilsed*, 2 Brod. & B. 403; *Jenkins v. Harvey*, 1 C. M. & R. 877; *Shephard v. Payne*, 12 C. B., N. S. 414; 16 Ib. 132, on

error; *Bryant v. Foot*, 7 B. & S. 725, *supra*, p. 216; *Malcomson v. O'Dea*, 10 H. L. C. 593; *O'Neill v. Allen*, 9 Ir. C. L. R. 132; 11 Ib. 95. See also *Rawstorne v. Backhouse*, 3 L. R., C. P. 67; *Baird v. Fortune*, 4 Macq. 127, 149.

(*d*) See *Morewood v. Wood*, 14 East, 327, n.; *The Mayor, &c. of Truro v. Reynolds*, 8 Bing. 275; *Bremner v. Hull*, 12 Jur., N. S. 648; *Duke of Beaufort v. Smith*, 4 Ex. 456.

(*e*) *The Mayor, &c. of Truro v. Reynolds*, *supra*.

(*f*) Per Ashurst, J., *Pelham v. Pickersgill*, 1 T. R. 660.

Evidence of long exclusive enjoyment of a fishery, of —of a fishery, a character to establish that it has been dealt with as of right as a distinct and separate property, and nothing appearing that the fishery is of modern origin, raises the presumption that the fishery, being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory (*g*).

Mines worked for a period beyond living memory, —mines, nothing appearing when the workings commenced, are presumed to be ancient mines, and the persons working them, having always had for a like period the use of an uninterrupted flow of water, and nothing appearing that the right to such user was not coeval with such working, the presumption would be, independently of the 2 & 3 Will. 4, c. 71, s. 2, that the owner of the mines had acquired, either by prescription or grant, such right (*h*).

Long uninterrupted usage of a pew in a church is —pew. ground for presuming a faculty (*i*), creating in the person claiming the pew, or in some person from or through whom it is claimed, in exclusion of all other persons, the right to the use of such pew (*k*).

The length of time during which the modern user Length of the has been exercised is a material consideration in determining the validity of a prescriptive right. A regular usage for twenty years, unexplained or uncontradicted and involving nothing to contravene public policy, is the foundation of many public and private rights (*l*).

(*g*) *The Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Mannall v. Fisher*, 5 C. B., N. S. 856; *Bridges v. Highton*, 11 L. T. R., N. S. 653; *Malcomson v. O'Dea*, 10 H. L. C. 593.

(*h*) *Ivimey v. Stocker*, 12 Jur., N. S. 419.

(*i*) Per Buller, J., *Griffith v. Matthews*, 5 T. R. 296, 298.

(*k*) Vide ante, p. 130 *et seq.*

(*l*) *The King v. Jolliffe*, 2 B. & C. 54; *The Free Fishers of Whitstable v. Gann*, 13 C. B., N. S. 853; *Blewett v. Tregonning*, 3 Ad. & E. 554, 583; 11 Ir. C. L. R. 95; *The Queen v. Stimpson*, 4 B. & S. 301; *Rolle v. Whyte*, 8 Ib. 116; *Garnett v. Backhouse*, Ib. 490.

And the modern use of a prescriptive right for that period at the least is, in general, necessary to raise such presumption. A much longer modern user, however, may be essential to raise the presumption. A usage of only forty years, applied to establish an exclusive right of fishing over an arm of the sea, will not destroy the right of the subject(*m*); such prior usage to the same effect may be presumed if nothing be shown to the contrary(*n*).

Reputation. Assuming evidence of reputation to be applicable to prescriptions, it is not to be admitted until a foundation has been first laid by other evidence of the right claimed(*o*).

Must be adapted to the nature of the claim. The evidence of the claim must be adapted to the nature of the prescription. Therefore evidence which tends, but is insufficient, to prove a *profit à prendre*, cannot be used to support a claim to an easement(*p*).

Proof of allegation of a several fishery. The allegation of a several fishery in an action of trespass for the disturbance of the fishery is proved by evidence showing such a fishery either as an incorporeal, and not a territorial hereditament(*q*), that is, a several fishery *in alieno solo*(*r*), or *vice versâ*, that is, a several fishery as an incident to the ownership of the soil(*s*).

Prescriptive and customary rights cannot be supported by the same evidence. If a prescriptive right and a customary one to the same privilege can exist in respect of the same land, each being distinctly proved by proper evidence applicable to each, the same evidence cannot be offered in support of both; for it would be inconsistent with common sense to say, that the very same facts could prove two rights of a completely different nature, and it would be neces-

(*m*) *Chad v. Tilsed*, 2 Brod. & B. 403. See also *The Queen v. Stimpson*, 4 B. & S. 301.

(*n*) *Chad v. Tilsed*, 2 Brod. & B. 403.

(*o*) See *Morewood v. Wood*, 14 East, 327, n.

(*p*) *Bailey v. Appleyard*, 8 Ad. & E. 161.

(*q*) *The Duke of Somerset v. Fogwell*, 5 B. & C. 875.

(*r*) *Holford v. Bailey*, 8 Q. B. 1000; 13 Ib. 426.

(*s*) *Marshall v. The Ulleswater Steam Nav. Co.*, 8 B. & S. 732. See also *Malcomson v. O'Dea*, 10 H. L. C. 593.

sary for a jury to elect among inconsistent rights which of them the evidence should appear to them to support (*t*).

The prescriptive title proved must be as large as (*u*), but may be larger than, the title claimed. The latter case implies that the lesser right claimed is included in the greater one proved (*x*).

Title to be proved, and extent of proof.

An absolute prescription is not supported by evidence of a qualified or conditional one, but the latter may be construed as an entire one, and then both parts of it ought to be pleaded (*y*).

User since the time of legal memory will not sustain a custom shown to have been non-existing anterior to such user, but is referable not to right but to usurpation (*z*).

The easement of stallage, without payment of anything for the use of the soil, cannot be claimed by the inhabitants or parishioners of a place by grant, for they cannot, in general, so claim in that character (*a*); and if the claim be rested on a grant from the owner of the market created within the time of legal memory, and no evidence of the market, or of the exemption, having been enjoyed anterior to such creation be given, the claim cannot be sustained by a presumption of the fact of user anterior to the creation of the market (*b*).

A prescriptive right, claimed by the owners and occupiers of a farm, to "the sole and exclusive right of pasture and feeding of sheep and lambs" on certain land as appertaining to the farm, is not proved by evi-

(*t*) *Blennett v. Tregonning*, 3 Ad. & E. 544. See also *Felkin v. Herbert*, 11 L. T. R., N. S. 173.

(*u*) *Wright v. Rattray*, 1 East, 377; *Beadsworth v. Torrington*, 1 Q. B. 782; *Manifold v. Pennington*, 4 B. & C. 161.

(*x*) *Fountain v. Cook*, 2 Selw. N. P. 2nd ed. 1258; *Bailey v. Appleyard*, 8 Ad. & E. 161, 167.

(*y*) *Paddock v. Forrester*, 3 Man. & G. 903.

(*z*) *Marquis of Anglesey v. Lord Hatherton*, 10 M. & W. 218; *Duke of Portland v. Hill*, 12 Jur., N. S. 286; 2 L. R., Eq. Ca. 765, *S. C.*

(*a*) Vide *supra*.

(*b*) *Lockwood v. Wood*, 6 Q. B. 67, n.

dence of the pasturing and feeding of the sheep and lambs of strangers on the land (*c*). On the trial Coleridge, J., considered that, although such evidence was admissible as evidence of the right, because whether lawful or not it might be very cogent to prove the existence of the right claimed, yet that it could not properly be considered as done in the exercise of the right. But on a motion for a new trial the court thought this mode of characterizing the evidence was calculated to weaken its due effect upon the jury, if it were entitled to be considered as a lawful mode of exercising the right, but held that the mode was a usurpation upon the lord's grant and unreasonable, and therefore refused the rule.

Effect of presumption of immemorial existence from continued modern user.

The presumption of the immemorial existence of a prescriptive right, based on continued modern user for a certain length of time, is, however, a *præsumptio juris tantum* (*d*), or one which may be rebutted; and if rebutted either by proof of the actual origin of the claim since the time of legal memory, or by its appearing that the claim could not possibly have existed at that date (*e*), or if there be anything in the nature of the subject-matter, or in the other evidence, to encounter the inference, or to suggest the necessity of other proof (*f*), is inadmissible, and the claim, whatever may have been its duration, has no binding validity in law. Furthermore it is immaterial whether the impossibility of the origin of the claim having been beyond the time of legal memory is shown by extrinsic evidence, or is to be gathered from the nature of the alleged claim itself; as where, in the case of an alleged customary payment, the amount is so large as to make it impossible that such a payment can have been established as far back as the reign of Richard the First (*g*).

(*c*) *Jones v. Richard*, 6 Ad. & E. 590.

(*d*) Best on Evidence.

(*e*) *Duke of Beaufort v. Smith*, 4 Ex. 456; *Blewett v. Tregonning*, 3 Ad. & E. 554, 583; *Bry-*

ant v. Foot, 7 B. & S. 725.

(*f*) *O'Neill v. Allen*, 9 Ir. C. L. R. 132.

(*g*) Per Cockburn, C. J., *Bryant v. Foot*, supra.

CHAPTER V.

THE LOSS OF RIGHTS ACQUIRED BY PRESCRIPTION AT
COMMON LAW.

A TITLE gained by prescription or by custom may be lost by an interruption in the right, as when the interest of the claimant in the right, and his interest in the land out of which the right is claimed, are coextensive(a); or by loss of the subject-matter in or to which the right is claimed(b); or by taking an absolute and independent grant of a similar right(c); or where the interruption is equal with the seisin, as enjoyment for ten years and disturbance by another ten years *in alternis vicibus* (d).

How a prescriptive title may be lost.

A prescriptive right founded on the user by the ancestor or the predecessor of the claimant will be lost by the mere non-user of the right for a period of sixty years(e).

Non-user alone.

Non-user, coupled with some act of the claimant indicating his intention to abandon the right permanently, as a disclaimer(f) or otherwise(g), or an acquiescence by him in an obstruction to the right, or in the exercise adversely by another person of a similar right(h), would extinguish the right. For the right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is

Coupled with intention to abandon.

(a) Co. Litt. 114 b.
(b) 4 Rep. 88 a.
(c) Finch, bk. 1, c. 3, s. 23; 6 Rep. 45; Com. Dig. Prescription, G.
(d) Bro. Stat. Lim. 42, 43.
(e) 32 Hen. 8, c. 2, ss. 1, 6; *Bevil's case*, 4 Rep. 8.

(f) 3 Bli. 241.
(g) See *Moore v. Ramson*, 3 B. & C. 332; *Liggins v. Inge*, 7 Bing. 693; 12 Q. B. 519.
(h) See *Rogers v. Brooks and Ux.*, 1 T. R. 431, n.; 1 Bing. N. C. 555; *Ward v. Ward*, 7 Ex. 339.

adverse to the user(*i*). Therefore where a person exercised adversely for thirty-six years a prescriptive right, a right to sit in a pew in a church, he was held, apparently by analogy to the Statute of Limitations, to have acquired, against the person who claimed the right before the commencement of such adverse exercise, the right to sit in the pew(*k*). And as an express release of the right would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. It is not so much the duration of the cesser, as the nature of the act done by the claimant, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of a jury(*l*). The intention, however, should be communicated to(*m*), and acted upon(*n*) by, the person against whom the right is claimed.

Resumption
after non-user.

But even after non-user of the right the person entitled to it may, within a reasonable time(*o*)—which however is not defined(*p*)—and, where he has had no occasion to exercise the right, even after a very long time(*q*), manifest his intention to resume the right(*r*).

Disuser of
public rights.

Public rights even, although not lost by mere obstruction(*s*), may be lost by disuser for a long period of time, and may be extinguished either by act of parliament, or by a writ of *ad quod damnum* and an inquisition thereon, or by natural causes; and in favour of long enjoyment, an extinguishment of such a right by one or other of these means may be presumed(*t*).

(*i*) Per Alderson, B., *Ward v. Ward*, 7 Ex. 839.

(*k*) *Rogers v. Brooks and Ux.*, 1 T. R. 481, n.

(*l*) 12 Q. B. 519.

(*m*) Per Erle, C. J., *Stokoe v. Singers*, 8 E. & B. 31.

(*n*) Per Denman, L. C. J., *Ib.*

(*o*) See *Moore v. Rawson*, 3 B. & C. 382.

(*p*) Per Erle, C. J., *Stokoe v. Singers*, 8 E. & B. 31.

(*q*) *Ward v. Ward*, 7 Ex. 839.

(*r*) See *Moore v. Rawson*; *Liggins v. Inge*; *Cook v. Mayor, &c. of Bath*, L. R., 6 Eq. Ca. 177.

(*s*) Vide *Vooght v. Winch*, 2 B. & Ald. 662.

(*t*) *Rea v. Montague*, 4 B. & C. 598.

The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long-continued suspension may impose upon the person claiming the right the necessity to show that some indication was given, during the period that he ceased to use the right, of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind (*u*).

Abandonment
a question of
intention.

A title, says Lord Coke, being once gained by prescription or custom, cannot be lost by interruption of the possession for ten or twenty years . . . and when a prescription or a custom doth make a title of inheritance it cannot be waived or annulled by payment or other matter *in pais* (*x*).

When a pre-
scriptive title
not lost.

A prescriptive title is not lost by taking a grant of a similar right in confirmation of a former one of the same kind (*y*), or where the right extends over two descriptions of land, and the grant is of the right over only one of them (*z*); or by an alteration in the mere quality of the thing to which the right is annexed (*a*), or by the mere non-user for sixty years by the claimant himself (*b*). And when made in a *que estate* (*c*), or for an easement (*d*), or privilege by way of discharge (*e*), or to enable persons who cannot prescribe, as a corporation, to implead and be impleaded, is not within the 32 Hen. 8, c. 2.

(*u*) *Crossley v. Lightowler*, 36 L. J., Ch. 584; *Cook v. Mayor, &c. of Bath*, *supra*.

(*x*) 1 Inst. 114 b, 352 a; 2 Ib. 653.

(*y*) See the authorities cited, 13 M. & W. 339, 340; *Earl Carnarvon v. Villebois*, Ib. 313; *The Mayor, &c. of Truro v. Reynolds*, 8 Bing. 275.

(*z*) *Earl Carnarvon v. Villebois*, *supra*.

(*a*) 4 Rep. 87 a; *Luttrell's case*, Ib. 86; *Comper v. Andrews*, Hob. 89; Com. Dig. Prescription, G.

(*b*) 32 Hen. 8, c. 2; *Bevil's case*, 4 Rep. 8.

(*c*) Bro. Stat. Lim. 35, 40.

(*d*) Ib. 36, 42.

(*e*) Ib. 39, 41.

So unless the right and the title to the land in which the right exists be co-extensive (*f*), or if the right be a natural one, e. g. a watercourse, which necessarily commences neither by prescription, nor by assent, but *ex jure naturæ*, and is neither an interest in, nor a profit out of, land (*g*), unity of possession will not produce an extinguishment of the right.

Non-user as evidence.

Mere non-user, however, although it will not in general affect a title gained by prescription or by custom, and is not, *per se*, an absolute bar to the right (*h*), may be evidence, although evidence only, to support a plea of a non-existing release (*i*). Mere non-user cannot affect a custom, where the question, whether it should be put in force or not, does not appear to have arisen (*k*).

From mere non-user, however, and more especially from adverse user, a conclusion against the right arises (*l*). A long intermission of the right would be a strong piece of evidence against the continuance of the right, but the effect of the intermission on the right would be for a jury to determine (*m*).

Period of non-user.

As to what period of mere non-user is sufficient to warrant the presumption of an abandonment or an extinguishment of the right, the authorities are not very precise. A vast number of years (*n*), and a long or a considerable period of time (*o*), have been mentioned.

As regards different rights,

In the case of mere non-user a distinction as to the time may arise according to the nature of the right; as where it is a *profit à prendre*, or an easement, which has been defined to be "a privilege that one neighbour hath of another, by writing or prescription, without

(*f*) Co. Litt. 114 b; 9 Jur., N. S. 422.

(*g*) *Shury v. Piggott*, 3 Bulstr. 839.

(*h*) *Dogherty v. Beasley*, 1 Jones, Ir. Rep. 123.

(*i*) *Ib.*; 3 Bli. 245; 3 Q. B., N. S. 588; *Moore v. Rawson*, *supra*.

(*k*) *Scales v. Key*, 11 Ad. & E. 819.

(*l*) 4 Q. B. 826.

(*m*) 3 Q. B., N. S. 588.

(*n*) 3 Bli. 245.

(*o*) See *Moore v. Rawson*, 3 B. & C. 332; *Rea v. Montague*, 4 Ib. 598; 3 Q. B. 588.

profit," and, according to the examples given, in the land of the other (*p*); or "a right which one man has to use the land of another for a special purpose" (*q*); or not strictly either a *profit à prendre* or an easement, as the right to the natural flow of water, which is a right *jure naturæ* (*r*), and neither depending on prescription (*s*), nor lost until an adverse easement in or to the water has been acquired (*t*); and the right to light and air, although sometimes designated an easement (*u*). And such right, not being to be used on the soil of the land of another, like a right of way, or of common, is not the subject of actual grant, may be considered to arise from an implied obligation in favour of the claimant to the light or the air not to interrupt the free use of them (*x*). Nor is such right a servitude, which is sometimes defined as a real right, *jus in re*, existing in the property of another (*y*), and is then synonymous with easement, but in the Roman law has a signification which would embrace the rights just mentioned. This right has been said to be in the nature of a servitude (*z*), a *quasi servitude*.

A *profit à prendre* and an easement may be claimed either by prescription, by custom, or by express grant, or by long enjoyment from which a grant is presumed, and cannot be lost by mere non-user for less than twenty years (*a*). For as enjoyment of these rights for such a length of time is necessary to found a presumption of a grant, there must be a non-user for a like period to raise a presumption of a release (*b*).

(*p*) *Termes de la Ley*, tit. Easement; 8 Rep. 46 b.

(*q*) 3 Kent's Com. 576, 10th ed.

(*r*) See 8 Bulstr. 339; *Rawstons v. Taylor*, 11 Ex. 382; 7 E. & B. 299; 7 H. L. C. 370, 379, 382; *Stokoe v. Singers*, 8 E. & B. 31.

(*s*) 8 Bulst. 339; Poph. 166; 1 Wils. 174; 7 H. L. C. 382.

(*t*) See *Stokoe v. Singers*, supra.

(*u*) See Gale on Easements.

(*x*) See *Moore v. Rawson*, 3 B. & C. 332.

(*y*) 3 Kent's Com. 576, 10th ed. citing Toullier.

(*z*) Per Erle, C. J., *Stokoe v. Singers*, 8 E. & B. 31.

(*a*) See *Moore v. Rawson*, supra; 3 C. B., N. S. 120.

(*b*) Per Littledale, J., *Moore v. Rawson*, 3 B. & C. 322.

Profits à
prendre and
easements.

Common. In cases of common, the ceasing to turn on cattle may be explained by the fact that there were not at the time commonable cattle to turn on. No necessary inference arises from a cesser during two, three, or seven years (*c*).

Way. The non-user of a way by the claimant for thirty-eight years, by reason of his having during that period a shorter and more convenient one over land of his own, was held not to affect the right (*d*). The only inference that could be reasonably drawn from the non-user was, that he had not occasion for the way (*e*).

Light and air. But in the case of light and air, which are acquired by mere occupancy, the right continues so long only as the claimant continues, or shows his intention to continue, the enjoyment, and is lost when discontinued and no act is done to show an intention to resume it within a reasonable time, which is not defined, and may be lost in a much less period than twenty years; and as the right is acquired by mere user, it may be lost by mere non-user (*f*).

Since 2 & 3
Will. 4, c. 71.

As, however, after the several periods of enjoyment prescribed by the 2 & 3 Will. 4, c. 71, the several rights to which it is applied are made absolute and indefeasible, they cannot, therefore, it would seem, be lost or defeated by a subsequent temporary interruption of enjoyment, not amounting to abandonment (*g*), of less than such periods (*h*), or, at least, twenty years.

Modification
of this law
as to,

—profits à
prendre,

—easements,

Prescription at common law, in relation to all rights of common or other profits or benefits to be taken and enjoyed from or upon any land (except tithes, rent and services), and all ways or other easements, all water-courses, or the use of any water, to be enjoyed or derived upon, over or from any land, and which may be lawfully

(*c*) 8 Q. B. 588.

(*d*) *Ward v. Ward*, 7 Ex. 889.

(*e*) Per Pollock, C. B., *Ib*.

(*f*) See *Moore v. Rawson*,
supra; *Stokoe v. Singers*, 8 E. &

B. 81.

(*g*) See *Taplin v. Jones*, 11
Jur., N. S. 309.

(*h*) See *Moore v. Rawson*, *supra*.

claimed at the common law, by custom, prescription or grant, and also the access and use of light to and for any dwelling-house, workshop, or other building, has been modified by the legislature, as will be hereafter shown. As to all such matters beyond that modification, and also as to all other prescriptive rights, prescription at common law is still in force.

Prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition real or otherwise, have also been the subject of legislation, and placed on a different foundation, as will be also hereafter shown.

—moduses,
—exemption
from tithes,

Tithes, as an inheritance, other than those belonging to a spiritual or eleemosynary corporation sole, rent, services for which a distress may be made, and all periodical sums of money payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole, have been transferred to the statute law of limitation, as will also be hereafter shown.

—tithes, rent,
&c.

BOOK IV.

TIME OF LIMITATION.

Statutes of
Limitation

TIME of Limitation, the subject of this Book, as distinguished from prescription at common law, the subject of the last Book, is prescription by legislative enactment, fixing times certain within which claims are to be asserted (*a*); or, says Lord Coke, as taken in law, a certain time prescribed by statute, within which the demandant in the action must prove himself, or some of his ancestors, to have been seised (*b*).

CHAPTER I.

THE TERRITORIAL OPERATION OF THE LAWS THE
SUBJECT OF THIS BOOK.

—affecting
different parts
of the king-
dom.

THE specific laws here to be considered are those contained in such of the several statutes to which reference has been made (*c*), as are now in operation, and affect, directly or indirectly, real property. Inasmuch, however, as these laws were not originally applicable in the whole of the United Kingdom, and as some of them are even now in some parts of it only, and even in those parts not everywhere the same, some notice of the ter-

(*a*) Litt. s. 170; Co. Litt. 113 114 b.
a, b, 114 b, 115 b. (c) Book I. Chap. II.
(*b*) 1 Rob. Ab. 685; Co. Litt.

ritorial operation of these different laws, before considering the laws themselves, will be appropriate.

The earlier statutes relating to the possessions of *England*. the Crown (*d*) were applicable in England only. After the union of England and Ireland, a statute (*e*), *Ireland*. containing substantially the same provisions as those in the later statute for England, was made and introduced into *Ireland*. These statutes do not extend to *Not Scotland*. *Scotland*.

The statute for shortening the time of prescription in certain cases (*f*), and the statute for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithes (*g*), did not originally extend to *Ireland*, but the former statute has been extended and applied there from the 1st of January, 1859 (*h*); and provisions similar to, but with some modifications of, those of the latter statute have also been made for *Ireland* (*i*).

The statute for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto (*k*), in all its provisions, with one exception, originally extended to Ireland. The exception was, so far as this statute related, to any right to present to, or bestow any church, vicarage or other ecclesiastical benefice in that part of the United Kingdom. In the year 1843 it was abolished, and the statute was extended and applied to Ireland, as to the matters excepted, as fully and effectually as in England (*l*).

The dominion of *Wales* of ancient time has belonged to the Crown of England. And it is said that King Henry the Third made Edward the First his *Wales*.

(*d*) 21 Jac. 1, cc. 2, 14; 9 Geo. 3, c. 16.

(*e*) 48 Geo. 4, c. 47.

(*f*) 2 & 3 Will. 4, c. 71.

(*g*) 2 & 3 Will. 4, c. 100.

(*h*) 21 & 22 Vict. c. 42.

(*i*) 1 & 2 Vict. c. 109, ss. 18—23.

(*k*) 3 & 4 Will. 4, c. 27.

(*l*) 6 & 7 Vict. c. 54, explained and amended by 7 & 8 Vict. c. 27.

eldest son, Prince of Wales, and gave him the dominion and dignity thereof; and the eldest sons of the kings of England have ever since been Princes of Wales (*l*). Some writers mention a grant of the principality to, but no creation of the title in, him (*m*). The son and heir apparent of this Prince was so styled, and some say was the first bearing the title (*n*). But Selden has said that the first charter of creation of the title he had seen was that of Edward III. to his son and heir apparent about six years after creating him Duke of Cornwall (*o*). Thus Wales, which before was under the order and government of the King of England, became subject to the order and government of the prince of England. The statute 27 Hen. 8 ordains, that the country or dominion of Wales shall from thenceforth for ever be and continue incorporated, united, and annexed to and with the realm of England; and that the people of Wales shall have, enjoy, and inherit all and singular rights, privileges, and laws within the realm of England, as other the king's subjects naturally born within the same have and inherit (*p*). In the reign of George the Second (*q*) the legislature declared and enacted, that in all cases where the kingdom of England, or that part of Great Britain called England, has been or shall be mentioned in any act of parliament, the same has been and shall from henceforth be deemed and taken to comprehend and include the dominion of Wales and town of Berwick-upon-Tweed.

Scotland,

Scotland, since the union, although within the meaning of the writ *ne exeat regno*, the operation of which was not affected by the union (*r*), is a part of Eng-

(*l*) Plowd. 126.

(*m*) Capgrave's Lib. de Illus. Hen. 90, 91; Chronica Johan. de Oxenedes, 198.

(*n*) 1 Walsingham's Hist. Anglica, 88; Rishanger's Chronica et Annales, 464.

(*o*) 3 Selden's Works, 631, 632.

(*p*) Plowd. 126.

(*q*) 20 Geo. 2, c. 47, s. 8.

(*r*) *Done's case*, 1 P. W. 262; *Bernal v. Marquis of Donegal*, 11 Ves. 46.

land(s), or, rather, forms with it that part of the united kingdom called Great Britain, and is within this realm(t).

After the union, difficulties arose in regard to the effect of writs *ne exeat regno*, which, while restraining the parties from going out of the realm, permitted them to go to Scotland, which was out of the jurisdiction of the court, and it was deemed necessary to alter the writ and the recognizance by extending the restraint to Scotland by name(u). —as to writs *ne exeat*.

Scotland is expressly excluded from the 2 & 3 Will. 4, c. 71, by section 9 of it, and from the 2 & 3 Will. 4, c. 100, by the last section of it, and from the 3 & 4 Will. 4, c. 27, by section 44 of it. Is excluded from certain statutes.

Although, said Lord Campbell, C.(x), Scotland and England are politically under the same Crown and under the supreme sway of one united legislature, yet, as to judicial jurisdiction, are to be considered as independent foreign countries, unconnected with each other. As to judicial jurisdiction is distinct from England.

The islands of *Man*, *Guernsey*, *Jersey*, *Alderney* and *Sark* are not named in any of those laws applicable to the Crown exclusively, or to the subject generally, as contained in the 2 & 3 Will. 4, c. 71 and c. 100, and therefore are not affected by them(y); and although named in the 3 & 4 Will. 4, c. 27, yet only for a purpose collateral to the main object of that statute, and in such a mode as not to be affected by it. In *Christian v. Goldie*(z) it was said, *arguendo*, by the eminent counsel for the appellant, that the Isle of *Man* was within its provisions. These islands are only declared not to be beyond the seas within the meaning of the act(a), that is, that an absence in any of these islands The Channel Islands excluded from the same acts.

(s) Per Dennison, J., 1 W. Bl. 287.

(t) Per Wilmot, J., Ib. 287. See fully on these cases, 8 Moore, P. C. C. 25, 26, 27.

(u) 8 Moore, P. C. C. 27.

(x) *Stuart v. Marquis of Bute*, 9 H. of L. Cas. 454.

(y) 1 Com. 105 *et seq.*

(z) 2 Moore, P. C. C. 226.

(a) Sect. 19.

shall not create or amount to absence beyond seas within the meaning of section 16. This appears to be the only effect of section 19.

Result.

The result is that *England* only, including *Wales* and *Berwick-upon-Tweed*, is embraced by the 9 Geo. 3, c. 16, and the earlier statutes relating to the possessions of the Crown, by the 2 & 3 Will. 4, cc. 71, 100, and by the 3 & 4 Will. 4, c. 27. *Ireland* only is embraced by the 48 Geo. 3, c. 47, relating to the possessions of the Crown there, by the 2 & 3 Will. 4, c. 71, from the year 1858 only, by the 3 & 4 Will. 4, c. 27, as respects all matters to which it extends, except advowsons, and as respects the excepted matters from the year 1843 only, but is not embraced by the 2 & 3 Will. 4, c. 100; but neither *Scotland* nor any of the Channel Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark* is embraced by any of these statutes.

3 & 4 Will. 4,
c. 27, adopted
in New South
Wales.

The statute containing one branch of these laws (b) has been adopted by the colonial legislature of New South Wales (c).

(b) 3 & 4 Will. 4, c. 27.

(c) *Devine v. Holloway*, 14

Moore, P. C. C. 290; *Hogan v. Hind*, lb. 310.

CHAPTER II.

THE PERSONS AFFECTED.

SECTION I.

The Crown and the Duke of Cornwall.

THE Crown, as affected by these laws, may be considered in relation to those possessions held *jure coronæ*, those held in right of the duchy of Lancaster, and those held in right of the duchy of Cornwall, when, on there being no Duke of Cornwall, they are vested in the Crown.

The Crown as respects three classes of possessions.

The nature of the royal person, considered in his or her public capacity and in his or her private capacity, and the effect of the union of those capacities, are peculiar. The king is *persona mixta*, because he hath both ecclesiastical and temporal jurisdiction (*a*). The body politic of the king is a body politic by the common law, which may take in the politic capacity, by the name of king, to him and his heirs, or by the name of king, to him and to his successors. But the body natural and the body politic of the king are not distinct, but united, and as one body (*b*); the latter body absorbs the former (*c*), and the land which he takes in the capacity of his body natural he has not merely as a common person, but as a natural man and as a king also; and as to such land he has the prerogatives of king, because the royal estate is conjoined to the person who holds the

Nature of the sovereign in his public and private capacity, separate and combined.

(*a*) *Caudrey's case*, 5 Rep. xxviii.

(*b*) Plowd. 242.

(*c*) 4 Cl. & F. 549.

How lands
vest in,

same (c), and when the majesty and name of the king are conjoined with the natural person, they alter, in the eye of the law, the quality and degree of the natural person. So that in general all lands and tenements which the king has, and whether acquired by purchase, or by descent, as the duchy of Lancaster (d), or given to or vested in him and his heirs (e), or, *à fortiori*, to or in him, his heirs and successors, and without saying as parcel of his Crown or to such effect, vest in him *in jure coronæ*, and go in succession as the Crown goes (f); for the word heirs implies both heirs and successors (g), and the word successors declares that the lands are annexed to the Crown and shall go in succession, and that he shall have them as king. These possessions are called *sacra patrimonia*, or *dominica coronæ regis* (h).

—and are held
by the sove-
reign.

It is only within the last half-century that any private property has been acknowledged to exist in the Crown at all: prior to that, all lands descending on the Crown, even from ancestors or collateral relatives, were held *jure coronæ*. All the property of the Crown is held for public purposes, and is Crown property, except that which the individual sovereign has retained a right to deal with in his private and personal capacity; it is public property which the Crown administers for the maintenance of the state. With respect to the Crown lands, they are as much public property as any other property connected with the consolidated fund, or connected with any other branch of the revenue; those lands are vested in the Crown for public purposes to maintain the dignity of the Crown; and the prerogative applies as much to them as it does to any other branch of the revenue appropriated to other services. Whether the particular property is under the management of the Lords of the Treasury, or under

(c) Plowd. 242.

(d) Plowd. 214.

(e) 7 Mod. 78; Cro. Jac. 248;
Skin. 608; 4 Cl. & F. 548; 9 Ib.
211.

(f) Plowd. 105, 244; Co. Litt.
16 a.

(g) Plowd. 242, 250.

(h) Co. Litt. 1 b.

the management of the Commissioners of Woods and Forests, is quite immaterial and whether the public revenue is subject to an arrangement which leaves it in particular officers, or in the hands of the Crown, the prerogative of the Crown is not altered by that arrangement (*i*).

The legislature, indeed, in the reign of George the Third (*k*), empowered the sovereign to dispose of, by any instrument under the royal sign manual, or by will, any manors, &c. purchased with monies from the privy purse, or with any monies not appropriated to any public service, or to any manors, &c. of whatsoever tenure, which have come or shall come to him by the gift or devise of, or by descent or otherwise from any of his, her or their ancestors, or any other person or persons, not being kings or queens of this realm. But such manors, &c., if not so disposed of, become part of the possessions of the Crown, and are held *jure coronæ* (*l*). And as to the lands so purchased, inasmuch as the royal estate is conjoined to the person who holds them, the royal prerogatives will attach thereto (*m*).

Power of disposing of lands purchased from the privy purse.

The Crown, however, is not affected by the Statutes of Limitation applicable to it where the property is, or can be considered or presumed to have been, acquired by the person claiming it, when claimed by virtue or through an office which must be presumed to have been derived from the Crown. Thus, the corporation of London claimed by prescription the freehold and bed of the shores of the river Thames, and also that from time immemorial they had held the office of bailiff or conservator of the river, and claimed the benefit of the 9 Geo. 3, c. 16, and the 2 & 3 Will. 4, c. 71. The M. R., Lord Langdale, said the right to the bed and soil of the river belonged to the Crown by the common

Not affected where lands are attached to an office derived from the Crown.

(*i*) 9 Cl. & F. 211, 212.

Plowd. 246, 247.

(*k*) 39 & 40 Geo. 3, c. 88.

(*m*) Plowd. 242.

(*l*) Sect. 5; Co. Litt. 15 b;

law, unless excluded by a stronger title in some other; that the office (claimed contemporaneously by the defendants) implied an authority or delegation conferred by some other, and could scarcely, if at all, be made consistent with the claim of ownership, which to a large extent, at least, would exclude the notion of any such delegation or authority from another; that he was bound to presume that the office must have been, and must be held to have been, derived from the Crown, and held under the Crown by its own grant or commission, or by act of parliament necessarily made with the concurrence of the Crown; and that the power, estate or authority, by or out of which the office was granted or derived, must be presumed to have reserved or kept to itself all that was not granted with the office. His lordship also said he thought that the office, being derived from the Crown, must be held to be of a fiduciary nature, and that the corporation must be held to have had imposed upon it, not only the duty of faithfully executing the office, but of so exercising it as to protect and not encroach upon the right of the Crown (*n*).

And in other matters.

The Crown is also, in several matters, unaffected by any Statute of Limitation, and may still avail itself of the prerogative rule or maxim, *nullum tempus occurrit regi*.

Thus, in those matters not embraced by those statutes relating to claims by the Crown exclusively, or by those statutes relating to claims by it, and by its subjects, but embraced by the other Statutes of Limitation (*o*), the Crown is unaffected by these other statutes, for in neither of them is the Crown specially named (*p*). And although the last cited statute is for the better ad-

(*n*) *Att.-Gen. v. The Corporation of London*, 12 Beav. 8. See also the remarks of Lord Cottenham, C., on appeal, 2 Mac. & G. 259, 264, 268.

(*o*) 21 Jac. 1, c. 16; 3 & 4 Will.

4, c. 42.

(*p*) Wightw. 148; *Rex v. Morrall*, 6 Pri. 24; *Lambert v. Taylor*, 4 B. & C. 153; 1 Dru. & W. 222.

vancement of justice generally, and therefore so far may be binding on the Crown, without being specially named (*q*), yet so far as it is a Statute of Limitation, the Crown is unaffected by it. The Crown, however, although unaffected by these statutes, may have the advantage of them (*r*).

So where in only some parts of a statute, as to some only of the subjects to which it is applied, the Crown is named, and in other parts of the same statute, as to other subjects to which it is applied, is not named, and the statute is one within the general rule as not binding the Crown, the Crown is not, in the latter case, affected by such other parts. For as one chapter of an act of parliament may be both general and particular, because one chapter may contain diverse acts and laws, which may be as several in their natures as if they were in several chapters (*s*); so, by parity of reason, where there are different provisions for different purposes, and penned in different words in the same chapter, they ought to be so construed, to avoid inconsistency, as if they had been in different chapters (*t*); and *expressio unius exclusio alterius*. Thus in the 2 & 3 Will. 4, c. 71, the Crown is named in the sections one and two, but is not named in the section three, which is applied to a different subject to those of the two former sections, and the statute being a Statute of Limitations, or of that nature, and not binding on the Crown unless named, the Crown is therefore not affected by the latter section (*u*). In all cases, therefore, not within the Statutes of Limitation relating to the possessions of the Crown, the extent to which the ancient maxim or prerogative, *nullum tempus occurrit regi*, is still in force, may be still a

(*q*) 5 Co. 14 b; 7 Ib. 32; 11 Ib. 66; Plowd. 236, 237; *Rea v. Wright*, 1 Ad. & E. 434; 10 Exch. 94.

(*r*) 11 Co. 68 b; Leon. 158; Plowd. 243.

(*s*) Hobart, 226.

(*t*) Parker's Rep. 13.

(*u*) See *Doe d. The Queen v. The Archbishop of York*, 14 Q. B.

81.

question. "It is difficult," said Eyre, B. (x), "to settle the bounds of this maxim. It is clear that the Crown shall in no case be bound by such imputed laches as would bar private persons, that the Statutes of Limitation shall not extend to it. Whether the maxim should go further I much doubt. With respect to presumption arising from the acts of other persons, I think it ought to have the same force against the Crown as against private persons. In the case of Alderman Chitty's will (y), it was presumed that the first sheet of the will was in the room at the time of the execution of the second sheet, which was attested by the witnesses. Suppose the Crown had been interested to contest that will. I think the same presumption ought to have prevailed against the Crown as did prevail against the heir at law. In old recoveries, a good tenant to the præcipe is presumed. If the Crown is a party, there ought to be the same presumption against the Crown as against the heir."

When not
where the right
is derived from
a subject.

When the Crown derives a right from or through a subject, and the law of limitation affecting the subject does not extend to the Crown, and the period of limitation within which the right is to be asserted has commenced but has not expired when the right vests in the Crown, the ancient prerogative rule or maxim is available for the Crown, and, as against the Crown, that period, from the time of the vesting of the right in the Crown, ceases to run (z).

When affected
where the right
is so derived.

Although, however, in general, the Crown is not bound by, because not expressly named in, the ordinary Statutes of Limitation, yet in cases of rights derived by the Crown from or through a subject against whom a plea of those statutes would avail, the Crown may be affected by those statutes, for the Crown is only entitled

(x) 3 Gwill. 1176; 2 E. & Y.
342, S. C. ———.
(y) 3 Burr. 1773.

(z) *Lamder v. Taylor*, 4 B. &
C. 138.

to the rights of the subject, and cannot create or revive a right if none existed, or it has become barred, and as the subject could not recover if the statute had been pleaded, so neither could the Crown standing in the same situation as the subject (*a*).

The Duchy of Lancaster is vested in the Crown by a title distinct and separate from the title to the possessions held *jure coronæ*. The title of the Crown to this duchy is founded upon a grant made in the year 1377 by Edward the Third to John of Gaunt, Duke of Lancaster, by which the county of Lancaster was created a county palatine, with various liberties and franchises to the duke for his life. By subsequent charters and acts of parliament, the duchy, with such rights as were originally granted with it, is now vested in her Majesty (*b*).

The possessions of the Duchy of Lancaster are vested in the king or queen in the regal capacity, and not as duke or duchess; for the latter title, being of an inferior order to the former, is, by the accession of the estate royal, drowned (*c*), and, by the common law, the name of the duchy and all the franchises, liberties and jurisdiction thereof, whilst in the hands of the king or queen having the Crown and jurisdiction royal, were extinguished. But the common law was altered, and the duchy became a duchy with the like franchises and liberties as formerly, but disjoined and separate from the Crown, and from the ministers and officers of the Crown, from the receipt of the revenues of the Crown, and from such order of conveyance as the law required in passing the possessions of the Crown. Notwithstanding such separation, however, the king or queen who has the duchy is not in any other estate or degree than before, and for things which concern his or her

Duchy of Lancaster created,

—and with its possessions vested in the sovereign, but separate from the Crown possessions.

(*a*) *Rees v. Morrell*, 6 Pri. 24.

(*b*) *The case of the Duchy*,
Plowd. 212; 5 Moore, P. C. C.
487.

(*c*) Plowd. 214; 2 H. of L. Cas.
910; *Alcock v. Cooke*, 5 Bing.
340.

person, is in the same estate as before, although having the possessions of the duchy in another degree, and yet not Duke or Duchess of Lancaster. In short the possessions of the duchy are merely severed from the possessions of the Crown in survey, order, government, and process, but not in person, so long as the Crown and the duchy are united in the same person (*d*).

Restoration of possessions formerly severed from it.

In the reign of Philip and Mary (*e*), such possessions of the duchy as were formerly severed from it, but had then reverted to the Crown, and as well those within as those without the county palatine of Lancaster, were again annexed to the duchy, as the other ancient possessions of it, and the Crown was empowered to annex to it any other honours, &c., within the realm of England, not being parcel of the ancient inheritance of the Crown, or of the principality of Wales, or of the duchy of Cornwall, or of the earldom of Chester, or being within the counties of Chester and Flint, or either of them, and not exceeding in the whole the yearly value of 2,000*l.*, for the further augmentation, honour and estate of the said duchy. And all such honours, &c., within the said county palatine so annexed, and also all those out of the same county so annexed, were subjected to the rule, governance and jurisdiction of the said duchy as the other possessions thereof within and without, respectively, the same county. In the present reign (*f*), the legislature authorized the sale of any land held in right of the duchy and not convenient to be held with the other possessions thereof, and to invest the monies produced by such sale in the purchase of other land convenient to be so held, to be conveyed to the Crown and to be vested in it in right of the said duchy, and be held with the like incidents as other land belonging to it.

Right to goods of intestates.

The right to the goods of persons dying within the

(*d*) Plowd. 214 *et seq.*

(*e*) 2 & 3 Ph. & M. c. 20.

(*f*) 18 & 19 Vict. c. 58.

county palatine of Lancaster intestate, without leaving husband or widow, and without kindred, was vested in King Edward the Third, in right of his Crown, at the date of the charter granting the duchy to John of Gaunt, and this right, within the county palatine, passed with other "*jura regalia*" to the Duke of Lancaster, and is now vested in her Majesty in right of her duchy (*g*).

The Crown, in relation to the possessions of the duchy of Lancaster, has the same prerogatives as it has in relation to the possessions *jure coronæ* (*h*). And the prerogative of the Crown is precisely the same as regards what is called the property of the sovereign, and the property of the public (*i*).

Prerogatives applicable to it.

In the reign of Queen Anne (*k*), and again in the reign of George the Third (*l*), the Crown was restrained from alienating the possessions belonging to it, whether in right of the Crown of England, or as part of the principality of Wales, or of the duchy or county palatine of Lancaster (*m*).

Crown restrained from alienating its possessions.

From these restraints, however, the legislature in the present reign, by "The Crown Private Estates Act, 1862" (*n*), have exempted the private estates of the Crown, and at the same time enabled the Crown to dispose of such estates, except those in Scotland, as provided by a former statute (*o*), and, subject to any such disposition under either the latter act or the act of 1862, such estates are to descend or go as prescribed by, and, according to the nature thereof, to be subject to, the provisions of such former statute. The act of

But empowered to dispose of its private estates.

(*g*) *Dyke v. Walford*, 5 Moore, P. C. C. 434.

(*h*) *Reg. v. Archbishop of York et al.*, Cro. EL. 240. See also *Alcock v. Cooke*, 5 Bing. 340; *Doe d. The Queen v. The Archbishop of York*, 14 Q. B. 81.

(*i*) Per Lord Brougham, 9 Cl. & F. 211.

(*k*) 1 Anne, stat. 1, c. 7.

(*l*) 1 Geo. 3, c. 1; 34 Geo. 3, c. 75.

(*m*) See *Doe d. The Queen v. The Archbishop of York*, 14 Q. B. 81.

(*n*) 25 & 26 Vict. c. 37, ss. 2, 5, 7.

(*o*) 39 & 40 Geo. 3, c. 88, s. 4. Vide *supra*, p. 241.

1862 also enables the Crown to dispose of such private estates as are situate in *Scotland* (*p*) without regard to the forms of the law there.

The present Prince of Wales, said Lord Curriehill (*q*), I suppose is infeft as heir to his father in an estate in Aberdeenshire; but although he succeeded to the Crown, that property would not belong to the Crown. It would belong to the sovereign as his private property, and he might dispose of it as he thought proper, but it would not belong to the Crown, and were he to die without his successors being infeft as heirs to him, the character of the right would not be changed.

Affected as to certain prescriptive rights.

The Crown also, in cases of prescriptive rights claimed against it in or upon the possessions of the duchy of Lancaster, of the nature of those provided for by the statutes passed in the reign of William the Fourth (*r*), is, in relation to those possessions, expressly embraced by those statutes.

Not within provisions applied to *Ireland* similar to 2 & 3 Will. 4, c. 100.

The Crown is not within those provisions of the statute abolishing compositions for tithes in *Ireland* and substituting rent-charges in lieu thereof (*s*), similar to but with some modifications (hereafter noticed) of the provisions of the 2 & 3 Will. 4, c. 100. In relation to those compositions, however, the Crown is expressly named (*t*).

Whether affected by 3 & 4 Will. 4, c. 27.

The Nullum Tempus Act (*u*) has been said to refer to the individual and to the personal and beneficial interest of the Crown (*v*). *Primâ facie* the Crown may seem to be affected by the 3 & 4 Will. 4, c. 27. If so, the rights of the Crown, as affected by the former statute, have been considerably abridged by the latter one.

General principle.

Generally speaking, in the construction of acts of parliament, the Crown is not included unless there be

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|---|-------------------------------|
| (<i>p</i>) Sect. 6. | 23. |
| (<i>q</i>) 3 Court Sess. Cas., 3rd Series, 448. | (<i>t</i>) Sects. 49, 50. |
| (<i>r</i>) 2 & 3 Will. 4, cc. 71, 100. | (<i>u</i>) 9 Geo. 3, c. 16. |
| (<i>s</i>) 1 & 2 Vict. c. 109, ss. 18— | (<i>v</i>) 18 Beav. 241. |

words to that effect; for it is inferred, *primâ facie*, that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown (*x*), and particularly in those statutes which would deprive the Crown of any prerogative, estate, right, title or interest (*y*). In *Att.-Gen. v. Radloff* (*z*), Pollock, C. B., said, *arguendo*, that the Crown is not bound with reference to matters affecting its person or property.

The court, in *Rex v. The Archbishop of Armagh* (*a*), admitted that the prerogatives of the Crown cannot be divested by the general words of a statute, but said that all his other rights are no more favoured in law than the rights of his subjects. A modern writer, apparently adopting this dictum, has said that the Crown cannot, by the general words of a statute, be stripped of any part of the ancient prerogative, nor of those rights which are incommunicable and are appropriated to him as essential to his regal capacity, but may be precluded of such inferior claims as might belong indifferently to the Crown or to a subject, as the title to an advowson or a landed estate (*b*). This, says a recent writer (*c*), is "the sensible conclusion," and is also said by another recent writer (*d*) to be "the modern doctrine." It is, however, submitted, with much respect for both these writers, that the law on this subject at the present day is as stated by Sir Edward Coke (*e*), and in the last paragraph.

(*x*) 11 Co. 68; Plowd. 244; *Att.-Gen. v. Allgood*, Parker, 1; *Kemp and another v. Laskey and others*, Ib. 92; *Att.-Gen. v. Buckley*, Ib. 264; *Att.-Gen. v. Donaldson*, 7 Mee. & W. 422; *Att.-Gen. v. Donaldson*, 10 Ib. 117; *Reg. v. Bayly*, 1 Dru. & War. 213.

(*y*) 11 Co. 74; *Mountjoy v. Wood*, 1 Exch., N. S. 58; *Tobin v. The Queen*, 14 C. B., N. S. 505;

Arding v. Holmes, 1 Exch., N. S. 85; *Re Cookfield Burial Board*, 17 Beav. 153; *Mayor and Aldermen of Weymouth v. Nugent*, 13 W. R. 338.

(*z*) 10 Exch. 94.

(*a*) 8 Mod. 8; Str. 516.

(*b*) 1 Woodd. 31.

(*c*) Dwarr. on Stat. 524.

(*d*) Broom, Leg. Max. 76.

(*e*) *Mag. Coll. Ca.*, 11 Co. 74.

Grounds for
its being,

The grounds for contending that the Crown is affected by the 3 & 4 Will. 4, c. 27, might be that although the Crown is not specially mentioned in any of the principal enactments, yet as the statute in express terms affects "person or persons, bodies politic, corporate and collegiate," under the word "person," unless the nature of the provision or the context of the statute exclude such meaning of the word, the Crown is within those words, for the sovereign is a person, *rex est persona mixta* (*f*), and also a body politic (*g*), and has been said to be the corporation of corporations, and the chief of corporations, and who makes all corporations (*h*); that the Crown can be exempted from the statute, if at all, by construction of law only; and that the statute is for the advancement of justice, and the Crown therefore cannot be so exempted from the statute (*i*) any more than it can be affected by a like construction (*k*). On the other hand, the grounds for contending that the Crown is not affected by the statute might be that, although the statute extends to all bodies politic, corporate or collegiate, yet these being mere general words do not, under the general rule that the Crown is not within the general words of a statute, extend to the Crown (*l*); that the remedies by entry, action and suit are not applicable to, although some of them may be resorted to by (*m*), the Crown, and do not include the ordinary remedies of the Crown (*n*); and that although as to advowsons the remedy for the Crown is the same as for the subject, yet that the auxiliary provisions in relation to the primary

—and not
being affected
by that statute.

(*f*) 2 Co. 44; 5 Ib. xxviii.; 13 Ib. 17.

(*g*) Plowd. 213, 234; 11 Co. 70.

(*h*) 2 Leon. 206.

(*i*) *Mag. Coll. Ca.*, 11 Co. 66; *Baron de Bode v. The Queen*, 13 Q. B. 364.

(*k*) *Att.-Gen. v. Allgood*, Parker, 1.

(*l*) See *Doe d. The Queen v. The Archbishop of York*, 14 Q. B. 81.

(*m*) Chitty's Prerog. of the Crown, 245.

(*n*) *Att.-Gen. v. Allgood*, *supra*; *Att.-Gen. v. Donaldson*, 7 Mee. & W. 422.

one applied to that sort of property, are not applicable in the case of the Crown. Again, in the present reign, the Nullum Tempus Act was amended and extended (*o*). It is therefore submitted that the statute of 3 & 4 Will. 4, c. 27, does not affect the Crown. Lord St. Leonards, indeed, when Lord Chancellor in Ireland (*p*), seemed to think that the Crown is affected by this statute. But Sir John Romilly, M. R., said (*q*) it clearly does not affect suits by the attorney-general to recover property belonging to the Crown, but that they depend on and are regulated by another statute, the Nullum Tempus Act.

Our limits forbid the notice of many interesting matters in connection with this part of the work, exhibiting the expanding freedom of the subject in his protection against the power of the Crown, or rather of the government, and the gradual relaxation of those high maxims of prerogative which in the earlier periods of our history were so frequently claimed and even strained for, or at least so as to have the effect of, restraining and sometimes even of repressing that freedom. But as these matters have only a collateral and not a direct bearing on this part of our subject they are, reluctantly however, omitted.

The eldest son for the time being of the reigning monarch of this country is Prince of Wales (*r*) and also Duke of Cornwall.

Duke of Cornwall, and Prince of Wales.

Lord Coke said of the Prince of Wales (*s*), *Coruscat enim princeps radiis regis patris sui, et censetur una persona cum ipso rege*, as it is said in the act of parliament of 38 Hen. 6 (*t*). The Prince of Wales is esteemed as one nearest to the king: so it has been determined in full parliament, in the case of the Prince

(*o*) 24 & 25 Vict. c. 62.

(*p*) 1 Con. & L. 83.

(*q*) 18 Beav. 246.

(*r*) Vide ante, pp. 235, 236.

(*s*) 8 Rep. 28.

(*t*) See also, Hob. Rep. 226.

of Wales in Henry the Sixth's time, and in his patent, which was made by authority of parliament in 34 Hen. 6, the introduction of the patent is, *Ut ipsum qui reputatione juris censetur eadem persona nobiscum, dignum preveniamus honore*, etc.; so that, in the eye of the law, they are to be reckoned but as one person^(u). In *Att.-Gen. v. The Mayor and Commonalty of Plymouth* (x), Legge, B., said he did not know that the Prince of Wales in any instance differs from other subjects; though he is the greatest subject, he is still only a subject. But in *Rowe v. Brenton* (y), Lord Tenterden, C. J., said he was clearly of opinion that the prince (speaking of him as Duke of Cornwall) is not to be considered as a private subject.

Duchy of
Cornwall
created.

The Duchy of Cornwall was created for the Black Prince, the eldest son of King Edward the Third, and for the eldest son for the time being (z) of the reigning monarch, in the eleventh year of the reign of that sovereign, by a charter made in parliament, and having the force of a statute (a). That prince was the first duke created in England after the conquest (b).

Possessions
of it.

To this duchy were annexed, by the same charter, extensive possessions, and the annexation of them, and of the duchy to the eldest son for the time being of the reigning monarch, was made indissoluble and inseparable (c); so that whenever there is such a son, the duchy and the possessions annexed to it belong absolutely to him as Duke of Cornwall, and he, as to the duchy and those possessions, is immediately seised of them, and stands precisely in the same situation as the sovereign himself does, and they are as entire and as

(u) Fortesc. Rep. 411.

(x) Wightw. 134.

(y) 3 Man. & R. 158.

(z) Seld. Tit. Hon. 2, c. 5, s. 29;
Arnold's Rep. 315, n. (c).

(a) *The Prince's case*, 8 Co.

1; Wightw. 150, 239. See the
Charters translated, 3 Man. &
Ry. 474.

(b) 2 Inst. 5; 9 Co. 49; Seld.
Tit. Hon. pt. 2, s. 29.

(c) Wightw. 160.

much protected when in the possession of the duke as when in the possession of the sovereign, and that for the necessary purpose of preserving their integrity (*d*). The duchy is a shifting and changing possession from the Crown to the duke and back again. When there is no duke the possessions revert to the sovereign and vest in him as before they vested in the duke, and the sovereign is seised of them by a title distinct and separate from the title to the possessions held *jure coronæ*. In short they shift so as to be at one time in the sovereign and at another time in the duke (*e*).

The estate of the Duke of Cornwall in the possessions of the duchy of Cornwall, the estate of the Crown when there is no duke, and the mode in which the duke, and, when there is no duke, the Crown, take the duchy, are of a peculiar and unusual character.

The Duke's estate and the nature of it.

The difference is in the nature and form of the limitation of the kind of estate to be taken in the duchy, not in the persons to take (*f*). The estate of the duchy of Cornwall is one of a very peculiar nature; there is nothing like it existing in the country. It is an estate vested in the Duke of Cornwall, when there is a Duke of Cornwall, and when there is no Duke of Cornwall it is vested in the Crown (*g*), and precisely in the same manner as the other lands which are annexed to the Crown (*h*), and vests in the king's eldest son and heir apparent to the Crown at the instant of his birth, and without gift or creation: it vests in him, too, according to the sounder opinion, as if he were of full age at his birth, and as if minority could no more be predicated of him than of the sovereign himself (*i*).

It has been said that by the terms of the charter

(*d*) Wightw. 239.

(*e*) *The Prince's case*, 8 Co. 1; Com. Dig., tit. Roy, G. a.; *Att.-Gen. v. St. Aubyn*, Wightw. 167; *Rowe v. Brenton*, 3 Man. & Ry. 158.

(*f*) Per Lord Hardwicke, 1 Ves. 294.

(*g*) Wightw. 148; 3 Man. & Ry. 224.

(*h*) Wightw. 243.

(*i*) Arnold's Rep. 815.

founding the duchy, the duke has in the duchy and in the possessions attached to it a fee simple (*k*). But other authorities have said that this is not the nature of his estate. The fee, said Legge, B. (*l*), is the most extraordinary fee that ever was created. Though the estate be a fee simple, it is not an absolute unqualified fee either in the duke or the sovereign, but is in the nature of a base or qualified fee (*m*). It is only a qualified fee in the sovereign until the birth of his or her eldest son, and when there is such a son, he takes a fee, but only a qualified one until he comes to the Crown, or until his own death (*n*). The effect of the limitation in the charter to the duke and to the sovereign alternately, said Graham, B. (*o*), is to give alternately a qualified fee simple to the duke, and when there is no duke to let the possessions of the duchy revert to the king and his heirs.

The duke, said Lord Coke (*p*), has in the honour and possessions of the duchy a fee simple by descent, although the descent is not according to the rules of the common law. But in *Att.-Gen. v. The Mayor and Commonalty of Plymouth* (*q*), Legge, B., said that not only the estate but the possession of the duchy is given to that person who, for the time being, is the eldest son of the sovereign, but such son does not succeed to them by way of descent as an heir does to his ancestor dying seised; he takes an estate of inheritance, as the eldest son and heir apparent of the Crown, and he succeeds as the person described; he takes nothing from his predecessor, but a fee arises in himself. He is no heir apparent in the life of the father, and *eo instante* that the estate ceases in the father, it vests in the

(*k*) *The Prince's case*, 8 Co. 1, 3rd point, 27; 4 Mod. 213; Wightw. 243.

(*l*) Wightw. 160.

(*m*) *Rees v. Inhabitants of Hermitage et al.*, Carth. 239.

(*n*) Per Parker, C. B., Wightw. 162.

(*o*) Wightw. 243.

(*p*) 8 Rep. 27.

(*q*) Wightw. 134.

prince by the act of parliament or charter, and not as heir to his father (*r*), and without gift or creation (*s*).

The possessions of the duchy of Cornwall are so guarded and so protected, by the express words of the charter or act of the legislature of Edward the Third (*t*), that the Statute of Limitations could not, in opposition to these words, affect those possessions. It cannot do it according to the judgment and record of parliament. By them it appears that the possessions are so annexed to the duchy that they cannot be disannexed, but by act of parliament; that is, by as high an authority as they were originally annexed (*u*). There can be no abatement against him, for in abatement there must be an entry of a stranger, between the death of the ancestor and the entry of the heir (*x*). But the duke does not take as an heir does to an ancestor dying seised (*y*); and not only the estate, but the possession of the duchy is given to the person who for the time being is duke, but not by way of descent (*z*). Again, as to the duke being in possession of the duchy as a royal prerogative, Legge, B., said (*z*) that he did not know that the duke, in any instance, differs from other subjects; though he is the greatest subject, he is still only a subject; but his estate and possessions are as effectually secured as if he had a personal prerogative; it is a parliamentary prerogative; they have annexed it as a prerogative. It would be an extraordinary thing to say, that the act has thrown an estate upon the duke, the most extraordinary fee that ever was created, and has made it to continue inseparably annexed to the Crown and indissoluble by any legal means, and at the same time to say, that they have still left it to be separated by wrong; and therefore there can be no disseisin of the duke, and if neither

Not affected
by general
Statutes of
Limitation.

(*r*) Wightw. 150, 151, 152, 158.

(*s*) Arnold's Rep. 315.

(*t*) See 8 Rep. 1; 3 Man. & Ry. 474.

(*u*) Wightw. 159.

(*x*) Co. Litt. 277 a.

(*y*) Wightw. 150, 152.

(*z*) Wightw. 160.

abatement nor disseisin can operate against him, the consequence must be that he must be considered as always in possession; and as the charter prevents the possessions being disannexed by an act of the sovereign or the duke, they are guarded from all acts by wrong, and in like manner the operation of the Statute of Limitations is prevented (*b*). But Graham, B., said (*c*), with respect to the operation of the Statutes of Limitation (*d*), in reading them, one sees that they are opposed simply as a bar to the claims of the Crown; but undoubtedly, if the Duke of Cornwall has the prerogative of the Crown, as attached to the revenues of the duchy, it cannot but be admitted, that these Statutes of Limitation would apply to the exercise of the prerogative of the Crown, as applied to the duchy lands, in the same way as to any other lands of the Crown. The subject, as against the duke, has a perfect right to stand on any advantage that these statutes will give him, or the subsequent statute in 1769, confining the possession of the Crown to sixty years next before the date of that statute; because these statutes must apply to the duke when exercising the prerogative of the Crown, in the same way as they apply to the Crown when exercising its own prerogative.

Is within the prerogative of the Crown.

The Crown during its own possession of the lands of the duchy of Cornwall may protect them by the royal prerogative, and this is continued to the Prince of Wales when he comes *in esse*. It exists for the protection of the Crown lands; the duchy lands are part of them, as a member of the royal establishment. The Crown has at all times an interest in them. There is the same expediency and use of the prerogative to protect them when the duke has them, as when the king. If the prince have not the same prerogative right as the

(*b*) Wightw. 164, 195, 196.
(*c*) *Ib.* 238.

(*d*) 21 Jac. 1, cc. 2, 14.

Crown, he would have the right to call the prerogative in aid (e).

The Crown, or, in other words, the public, has an interest in everything which is done in the duchy, and whether the act done is done under the authority of the king, or under the authority of the duke, when there is a duke; for in all these matters the interest of the Crown is equally concerned; and considering the very peculiar nature of the duchy of Cornwall, whether the duchy be vested in the Crown or in the duke, the Crown has a peculiar interest in it at all times, and whatever is done at any period is to be received in the same manner. Whatever is done during the existence of a duke is to be treated in the same manner as if it were done by the Crown (f).

The interest of the Crown in relation to the Duchy.

The Duke of Cornwall, in cases of prescriptive rights claimed against him in or upon the possessions of that duchy, of the nature of those provided for by the statutes passed in the reign of William the Fourth (g), is expressly embraced by those statutes.

Statutes of Limitation applied to.

The duke, however, is not within either those provisions of the statute abolishing compositions for tithes in *Ireland* and substituting rent-charges in lieu thereof (h), similar to, but with some modifications (hereafter noticed) of, the provisions of the 2 & 3 Will. 4, c. 100, or the other provisions of the statute effecting such abolition.

The present Duke of Cornwall and his corporeal possessions, shortly after his birth, became, in the present reign, for the first time, also subject to a separate and special law, similar to the Nullum Tempus Act (i), and that act was subsequently extended (j). The expression "the Duke of Cornwall," in both these acts, in-

(e) Wightw. 242, 252.

(f) 8 Man. & Ry. 158, 224.

(g) 2 & 3 Will. 4, cc. 71, 100.

(h) 1 & 2 Vict. c. 109, ss. 18—

23.

(i) 7 & 8 Vict. c. 105.

(j) 23 & 24 Vict. c. 53, amended by 24 & 25 Vict. c. 62.

cludes the present duke and his predecessors and successors Dukes of Cornwall, and also the Queen and her predecessors and successors kings and queens of England for the time being, entitled to the possessions or the revenues of the duchy during a vacancy of it (*k*).

The duke and his possessions as respects himself personally, until he came into *esse*, could not be affected by any of the laws of limitation, and such separate and special statute was equivalent to a legislative declaration that, after his birth, he was not affected either by the laws of limitation affecting the Crown, or by the general laws of limitation affecting the subject.

Whatever concerns the prince concerns the king, and whatever concerns the king concerns every subject in England; and therefore the acts relating to the duchy of Cornwall are public laws, of which everybody is to take notice (*l*).

Effect of dispositions by the Duke or the Crown.

The nature of the estate of the Duke of Cornwall and of the Crown in the possessions of the duchy involves all dispositions, even those essential for the mere management of them, in more or less difficulty. Thus, although in case of advowsons, the clerks presented by the Crown continue after the birth of a duke, yet a lease for years by the Crown determines by the birth of a duke (*m*). The shifting of the title is of a very peculiar nature, and singularly calculated to interfere with grants of leasehold interests. For if the Crown devolves upon the Duke of Cornwall, having no son, there ceases to be a duke, and then the duchy is in the Crown; and so, if the duke die. But at any moment a son may be born, and his birth divests the duchy; and the duke then holds it subject to the double contingency of his own and his father's death. Originally, therefore, no acts done either by the Crown or the duke could give any permanent leasehold interests to the tenant; yet

(*k*) 7 & 8 Vict. c. 105, s. 92;
23 & 24 Vict. c. 53, s. 4.

(*l*) Fortesc. Rep. 411.
(*m*) Ca. Ch. 215.

it so happened much, indeed most, of the duchy property was of a kind that required the outlay of capital; as mines in Cornwall, or building land in or near London (*n*). Hence the various statutes in relation to the management of the possessions of the duchy (*o*).

It is undeniable, however, that the property of the duchy may, like that of any other body or any individual, be so administered as to create rights, against which those who may have suffered them to be established will in vain struggle (*p*).

SECTION II.

Persons in general, other than the Crown and the Duke of Cornwall, affected by these Laws.

Persons are divided by Lord Coke into persons Division of persons. natural, created of God, as J. S., &c., and persons incorporate or politic, created by the policy of man, and therefore called bodies politic (*q*). Bodies politic, or corporations, as they consist of several persons, or of an individual only, are either aggregate or sole; and considered with reference to the objects or purposes to which they are directed, are either spiritual or lay, and, when lay, are either civil or eleemosynary (*r*); and a civil or an eleemosynary corporation, although it may be, or may have for its head, a spiritual person, does not acquire, from that circumstance alone, anything of a spiritual nature or character. A benefice is not spiritual because only a person in holy orders can hold it; the object for which the benefice is established makes it either a spiritual or a lay foundation. If an hospital be

(*n*) *Clayton v. The Lords of the Treasury*, Arnold's Rep. 812, n. (*o*).

(*o*) *Ib.* See also *Att.-Gen. v. St. Audyn*, Wightw. 167.

(*p*) Per Lord Brougham, Arnold's Rep. 814.

(*q*) Co. Litt. 2 a.

(*r*) 1 Com. c. xviii.

established for the relief of the poor, and the founder has annexed, as a qualification for the office of master or warden of it, that he shall be a clerk in holy orders, but no cure of souls is attached to the office, the foundation is not spiritual, but lay merely (*s*).

Who within
2 & 3 Will. 4,
cc. 71 and 100,
and 3 & 4
Will. 4, c. 27.

Generally, all persons, other than the Crown and the Duke of Cornwall, having claims in or to property, the subject of the statute 3 & 4 Will. 4, c. 27, are within it, and all persons, including, as noticed in the last section, the Crown and the duke, are within the statutes 2 & 3 Will. 4, cc. 71, 100.

Persons claim-
ing deriva-
tively.

The former Statute of Limitations (*t*), after enacting that no person shall make an entry but within twenty years next after, &c., enacted, that in default thereof, such persons so not entering, and *their heirs*, shall be excluded from entering afterwards; and this included the heirs of a donee in tail as well as the heirs of a person seised in fee simple (*u*). The 3 & 4 Will. 4, c. 27, fixes the period of limitation next after the accruing of the right to enter, &c., to some person through whom the person entering claims, or to himself; and some person through whom, &c., means any person claiming as heir, issue in tail, &c., &c. (*x*).

"Person,"
meaning of in
c. 27.

In the first of these three statutes the term "person" only is used in most of the enactments, and, as is enacted by section 1, comprises or extends to not only individuals, but also bodies politic, corporate, or collegiate, and a class of creditors or other persons, unless the nature of the provision or the context exclude such meaning, as, for instance, in sects. 13, 16, 17, 18, and 29; and therefore includes every description of corporation, spiritual, eleemosynary and civil, whether sole or aggregate, and as well those who are, as those who are not, restrained from alienating their possessions.

(*s*) 17 Beav. 465.

(*t*) 21 Jac. 1, c. 6.

(*u*) *Tolson v. Kaye*, 3 Brod. &

B. 217.

(*x*) Sects. 2, 1.

And that this was the intention of the legislature, this statute, besides the interpretation clause, affords internal evidence. Thus by the section 29, all spiritual and eleemosynary corporations sole are allowed a more extended period for asserting their claims than they would have had under the sections 2 and 24; and that section 29 is not an independent enactment in the negative as respects such corporations sole, but is an affirmative enactment grafted upon or operating in favour of such corporations, by way of exception out of the negative enactments in the sections 2 and 24. If corporations generally had not been included in the word "person," and thus comprised within the terms of these two sections, the section 29, framed as it is, would, plainly, have been unnecessary. Again, as regards advowsons, charges upon land or rent, legacies, arrears of rent, of interest in respect of money charged on land or rent, and in respect of any legacy, and damages in respect of such arrears, no enactment similar to the section 29 is found in the statute. The subsequent statute 7 Vict. c. 54, as respects advowsons belonging to bishops who, in right of their sees, are patrons, also affords evidence of such intention.

The term "person," however, used generally in a statute, may include corporations as well as natural persons. Thus Lord Coke, in his commentaries on the 39 Eliz. c. 5, says, "person and persons" regularly do extend to any body politic or corporate, but not to such as are restrained by any act of parliament to alien, &c., but doth extend to such bodies politic and corporate as may alien, and to all other persons whatsoever (y); and the intention of the legislature may require the "person" to be applied to and to comprehend corporations (z), and sometimes natural persons or individuals

When used generally in statutes.

(y) 2 Inst. 722. See also Plowd. 538.

(z) See Plowd. 538; *Curtis v.*

The Kent Waterworks Company, 7 B. & C. 814; *The Conservators of the River Tone v. Ash*, 10 Ib.

only. Thus, in the former part of sect. 1 of the Statute of Uses (*a*), the term is used as respects natural persons only, and in the latter part of the same section is used as respects them and with and in contradistinction to corporations, so that a person natural may be seised to the use of a corporation, but not *à converso* (*b*). It has been said, however, that the stress laid by Bacon upon this term thus used, as not comprehending corporations, is considerably weakened by the decisions upon the Statute of Fines, where this term only is used, and yet is held to extend to corporations (*c*), and Plowden is cited. But the reason assigned by him for this term in the Statute of Fines including corporations is that, although the *words* of that statute seem to bar natural persons and their heirs only, and no mention is made of any corporation or of successors, yet the act being made for the public good and to quiet the inheritances of the subjects of the realm, the intention was to extend the act to those corporations which have in themselves absolute estate and authority, but not to those having no such estate and authority (*d*). So in the Statute of Limitations, 21 Jac. 1, c. 16, the term person only is used, but, for the same reason as applied to the Statute of Fines, would extend to corporations (*e*). The terms "person or persons," as used in sect. 1 of the Statute of Mortmain (*f*), in relation to those who make the dispositions thereby prohibited, do not include corporations (*g*).

Whom it includes in c. 27.

This term "person," as used in the 3 & 4 Will. 4, c. 27, applies to and includes not only those corpo-

849; *Boyd v. The Croydon Railway Company*, 6 Scott, 461; 4 Bing., N. C. 669, S. C.; *Bishop of Meath v. Marquis of Winchester*, 4 Cl. & F. 445; *Att.-Gen. v. The Corporation of Newcastle*, 5 Beav. 307; 12 Cl. & F. 402, 419.

(a) 27 Hen. 8, c. 10.

(b) Bac. Uses, 59.

(c) Sug. Gilb. Uses, 7, n.

(d) Plowd. 538.

(e) See 3 P. W. 143.

(f) 9 Geo. 2, c. 36.

(g) *Walker v. Richardson*, 2 Mea. & W. 882; *Att.-Gen. v. Glyn*, 12 Sim. 84.

rations having property in their own right, but also those who are merely trustees for other persons (*h*). Churchwardens, as trustees, within sect. 25, for the poor of a parish as a class of persons within sect. 24 (*i*), and classes of persons, as churchwardens and the poor of a parish (*h*). The latter class are mere *cestui que trusts*, for the law recognizes no rights except legal and equitable; and an information by the attorney-general on their behalf is, in truth, a suit by them, and unless a suit is by them as *cestuis que trust* against their trustee they must sue within twenty years (*l*). As a class of persons, however, Lord Chelmsford, C., said that but for the decision in *Att.-Gen. v. Mag. Coll.* he would have been inclined to think that the word "class" was intended to designate a body of ascertained and defined persons, and not a fluctuating body, such as the poor of a parish (*m*).

Trustees.

Classes of persons.

This term, applied to a person claiming any land or rent under sect. 24, means a person who has some beneficial estate, interest or right in the land or rent (*n*), and therefore the attorney-general, suing in his official capacity on behalf of the poor of a parish, is not such a person (*o*); he is only a part of the machinery by which the rights of others are sought to be enforced. He is no more a party claiming a right, than in an ordinary action at law the attorney on the record is such a person. But the real litigants, and not those by whose intervention the rights in dispute are endeavoured to be sustained, must be regarded. He is only an instrument to enforce the rights of those who are entitled to the

Meaning of, in sect. 24.

Excludes the Att.-Gen. suing officially.

(*h*) *Mag. Coll. Oxon. v. Att.-Gen.*, 6 H. of L. Cas. 189; *Att.-Gen. v. Davey*, 4 De Gex & J. 36; *Att.-Gen. v. Payne*, 27 Beav. 168.

(*i*) *Mag. Coll. Oxon. v. Att.-Gen.*, 6 H. of L. Cas. 189.

(*k*) *Ib.*; 4 De Gex & J. 140.

(*l*) 6 H. of L. Cas. 212; *Att.-*

Gen. v. Davey, 4 De Gex & J. 136; *Att.-Gen. v. Payne*, 27 Beav. 168.

(*m*) 4 De Gex & J. 140.

(*n*) Per Sir J. Romilly, M. R., *Att.-Gen. v. Mag. Coll. Oxon.*, 18 Beav. 241.

(*o*) 18 Beav. 240; 6 H. of L. Cas. 210.

benefits of the charity, and stands in the same situation as they do with respect to those rights; and if the claimants on whose behalf he is suing are barred, he must also be barred. He has no independent title of his own; he must succeed or fail as they are entitled to succeed or fail; and if the Statute of Limitations is a bar to them it is a bar to the attorney-general (*p*).

Persons entitled to dignities.

Persons rightfully entitled to dignities which have been erroneously supposed to vest in, and on such supposition have been exercised by persons not entitled to them, do not in general lose by the mere length of time during which the rightful title thereto has not been asserted, where, at least, no person interested under the last person so not entitled to but exercising them is in being, the right thereto, and as to such claims are not affected by the 3 & 4 Will. 4, c. 27 (*q*). When, however, a dignity has been descendible at a particular period in a way that would entitle the claimant to take it up, but he did not make or, at all events, did not succeed in establishing his claim, and the circumstances of the case do not satisfactorily explain the fact of the dignity not having been taken up, a great presumption is raised against the claimant (*r*).

Corporations or trustees for charitable purposes.

Notwithstanding the comprehensive meaning given to the word "person" in the 3 & 4 Will. 4, c. 27, embracing corporations of every description (*s*) as well as all natural persons, except the Crown and the Duke of Cornwall in either character (*t*), doubts were entertained whether corporations or trustees for charitable objects or purposes were within the operation of this law (*u*).

(*p*) 18 Beav. 210, 214, 216; *Att.-Gen. v. Davey*, 4 De Gex & J. 136; *Att.-Gen. v. Payne*, 27 Beav. 168.

(*q*) *Barony of Willoughby of Parham*, 31 Lords' Journ. 530, 537; 3 Cru. Dig., tit. xxvi., cap. 1, s. 64; 8 Cl. & F. 158.

(*r*) 8 Cl. & F. 158.

(*s*) *The Commissioners of Donations v. Wybrants*, 2 Jo. & La T. 182.

(*t*) Vide Sect. I. of this Chapter.

(*u*) *Incorporated Society v. Richards*, 1 Con. & L. 58; *Att.-Gen. v. Perse*, 2 Dru. & W. 67; *The*

Before the c. 27, courts of equity were not bound by former Statutes of Limitation in dealing with trust estates, but their proceedings were in analogy to those statutes. . . . With respect, however, to that particular species of trust which had charity for its object, courts of equity did not follow the analogy of the statutes. The grounds of distinction were, that laches cannot be imputed in cases of charity, and perhaps also there was a leaning towards such a mode of applying property; and this feeling might likewise operate, that the parties most interested are generally amongst the classes most in need of aid, and least able to assert their rights. . . . This practice has frequently led to very great hardship, and that in attempting to be just towards certain classes, such as the poor, the consequence often was that there was great injustice done to the classes above them (v).

Before c. 27 not affected by length of time, or Statute of Limitations.

The general rule was that as to persons holding property for charitable purposes, no length of time, nor any Statute of Limitations, operated as a bar to those persons (x). If an instrument declared in express terms that the property was given to charitable purposes, although there had been enjoyment to the contrary, that would not avail, but the property must go according to the express words of the instrument, because it showed what was disposed of to charity, that is, the property itself (y).

But when the existence of the trust for the charity was involved in obscurity, or the question was as to the effect and true construction of the instrument by which the property was devoted to the charitable purposes, and there had been an enjoyment for a long time, that

Effect of long enjoyment against, where the trust was obscure,

Commissioners of Charitable Donations v. Wybrants, 2 Jo. & La T. 182; *Att.-Gen. v. Flint*, 4 Hare, 147; *Att.-Gen. v. Mag. Coll. Oxon.*, 18 Beav. 223.

(v) Per Lord Cranworth, C., 6

H. of L. C. 207.

(x) 2 Vern. 399; 1 Eq. Ca. Ab. 804; 2 Ib. 12; 2 Jac. & W. 321; Jac. 446; *Att.-Gen. v. Christ's Hospital*, 3 Myl. & K. 344.

(y) 2 Vern. 299.

enjoyment, without interruption, was considered great evidence of right, for quiet enjoyment for a long time creates a presumption of rightful enjoyment, and was always considered a very material consideration, and with that enjoyment, and the right not appearing to the contrary, all law and equity ought to determine (z).

—and of dispositions of the property.

So as to dispositions of property devoted to charitable purposes. If the Statute of Limitations was in such a case no bar, it was at all events a circumstance which produced a very powerful obstacle, not easily got over, in the way of any court of judicature that might set aside what had stood so long, and might have been made the subject of so many arrangements (a). And where the origin of the charity did not appear, and a sale had taken place at a very distant date, and had since been acquiesced in, these facts might afford ground to presume that there was originally power to sell. Such a presumption, where circumstances warrant it, might reasonably be made in favour of long enjoyment. The enjoyment, independently of the Statute of Limitations, could not have been lawfully had without such a power, unless there were circumstances to justify the sale. In cases of that sort, therefore, if there had been long enjoyment under a sale, and no account of what the origin of the charity was, the presumption was not unreasonable that there might have been, although not discovered, a power to enable the parties holding the charity lands to sell them, and that it was under that power that the sale had been made (b). Generally, indeed, if consistently with the facts proved in any given case, the presumption of a state of circumstances, which would render a disposition of property devoted to charitable purposes for other purposes,

(z) 2 Vern. 299; 2 Jac. & W. 321.

(a) 2 Cl. & F. 378.

(b) Per Lord Cranworth, C., 6 H. of L. Cas. 205. See also 17 Beav. 464, 465.

be possible, a court of equity, after the lapse of a great length of time, would raise such a presumption (c).

It has however been now solemnly determined by the highest court of judicature (d), that all persons, as well as corporations as natural persons, who hold lands for charitable purposes, are within the operation of c. 27. The sections 24 and 25 apply in terms to all trusts. Charities are trusts, a favoured sort of trust, no doubt; but still a charity is a trust and nothing more. Trusts generally are mentioned, and that includes charitable trusts, unless they are expressly excepted, and there certainly is no such exception. Therefore a grantee in fee for value of persons in the actual possession of, though not having the legal estate in, lands devoted to charitable purposes (e), and a lessee of such lands under a lease at a small nominal rent (f), acquire against the trustees and the *cestuis que trust* of such lands, by the possession thereof for twenty years, an unimpeachable title thereto. A lease is an alienation *pro tanto*, and, if for a long term at a peppercorn rent, would be equivalent to an absolute alienation (g), and even for a dry term and no rent paid and possession under it would give the lessee a title after twenty years (h).

In the Mag. Coll. case the alienation was by a rector and churchwardens to a stranger; in *Attorney-General v. Payne* the alienation was by an eleemosynary corporation and ostensibly to a stranger, but in reality to him as a trustee for the master of the hospital. But Sir J. Romilly, M. R., said the character of the alienee could not affect the question; it might affect the question of the breach of trust, and it might induce the court to hold that the lease could not be supported, if

(c) See *Att.-Gen. v. Christ's Hospital*, 3 Myl. & K. 344.

(d) *Mag. Coll. Oxon. v. Att.-Gen.*, 6 H. of L. Cas. 189.

(e) *Mag. Coll. Oxon. v. Att.-Gen.*, *supra*.

(f) *Att.-Gen. v. Payne*, 27 Beav. 168; *Att.-Gen. v. Davoy*, 4 De Gex & J. 136.

(g) 27 Beav. 174.

(h) See 4 De Gex & J. 139.

Now within
3 & 4 Will. 4,
c. 27.

granted to the master, though it could not be reconciled with the case of *Wilson v. Master of the Rolls* (i). As soon as the lease was granted the lessee held adversely to the rights of the charity, to the extent of the alienation contained in the lease (k). The case in Burrow, referred to by his Honor, was the case of a lease granted by Sir J. Jekyll, M. R., to a trustee for himself; and on a special verdict *at law*, the lease so granted was held to be valid.

Whether
within 2 & 3
Will. 4, c. 71.

In the 2 & 3 Will. 4, cc. 71 and 100, are included in express terms, not only the Crown and the Duke of Cornwall, but also all corporations and all natural persons. But whether corporations sole, spiritual and eleemosynary, are within the section 3 of the chapter 71 may be a question (l).

Trustees and
cestui que
trust, together
or separately
as to other
persons.

In different persons and in the same land ownerships of different natures frequently co-exist. Thus land may be vested in A. in trust for B. In a court of law A., the trustee, is regarded as the owner of the land, having the legal interest, the person in whose name all actions must be brought, and B., the *cestui que trust*, as having no interest (m); but, in equity, B. is considered as actually and absolutely seised of the freehold (n), and in relation to strangers he and A., the trustee, are considered, as but one person (o). In such cases the right of the trustee only, or of the *cestui que trust* only, or of both of them together, may be lost by the possession by a third person for the period fixed by the law.

Before 3 & 4
Will. 4, c. 27,
and since
where it is not
applicable,

Before the 3 & 4 Will. 4, c. 27, and even since, as respects those matters to which it does not apply, when the trustee was and is barred of his right at law, the *cestui que trust*, although under disability (p), was and

(i) 4 Burr. 1975.

(k) 27 Beav. 174.

(l) See and consider c. 71, s. 7,
and c. 100, s. 6.

(m) 7 Bing. 599.

(n) Per Lord Mansfield, *Bur-*

gess v. Wheate, 1 Eden, 226.

(o) 4 Hare, 417.

(p) See *The Earl v. The*
Countess of Huntingdon, 3 P. W.
810, n. (G); *Wyck v. The East*
India Co., lb. 809.

may be also barred in equity by the operation of the Statute of Limitations operating in a court of law against the trustee(*q*). Where, said Lord Hardwicke(*r*), a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. A *cestui que trust*, said Lord Redesdale(*s*), is always barred by length of time operating against his trustee. If the trustee does not enter and the *cestui que trust* does not compel him to enter, as the person claiming paramount, the *cestui que trust* is barred. If, said Sir T. Plumer, M. R.(*t*), there is a legal bar from the statute it is constantly adopted in equity. It is incumbent on the plaintiff to make out an equitable title; to do this he must show that the legal title is not barred If the bar attaches on the legal title it attaches also on the equitable title, and precludes the plaintiff from the equitable relief he seeks.

cestui que trust was and is barred when the trustee is.

So, where a trust fund is lent on mortgage, with notice of the trust, and the trustee, the mortgagee, is barred, the *cestuis que trust* are also barred. If, said the court, the right of the trustee to recover be bound, their right is also bound. They have no direct right of suit against the mortgagor or the mortgaged premises: they must sue through their trustee, and if by his default the right to recover the money is lost, he is answerable to them, and he can, of course, have no protection from lapse of time(*u*).

Sir Joseph Jekyll, M. R., indeed said(*x*), that the forbearance of trustees in not doing what it was their office to have done shall in no sort prejudice the *cestui que trust*, since at that rate it would be in the power of

(*q*) 1 Atk. 591; 2 Jac. & W. 154; 1 Sch. & Lef. 379; 3 P. W. 809, 310; 2 Ball & B. 75; 8 Ves. 181; 9 Cl. & F. 219; 1 Jac. & W. 582.

(*r*) *Llewellyn v. Mackworth*, 2 Eq. Ca. Ab. 579.

(*s*) 2 Sch. & Lef. 629.

(*t*) 1 Jac. & W. 556.

(*u*) *In re Scott*, 8 Ir. Eq. Rep., N. S. 316.

(*x*) *Lechmore v. Earl of Carlisle*, 3 P. W. 211.

trustees, either by [not] doing, or delaying to do, their duty to affect the right of other persons, which can never be maintained (y). But Lord Manners, C., said (z), that the opinion of Sir J. Jekyll had been often denied, and is contrary to many decisions.

The reason of such bar.

When before the 3 & 4 Will. 4, c. 27, a *cestui que trust* was barred of his claim in equity by the Statute of Limitations operating at law as a bar to his trustee having the legal estate, the reason probably was that although courts of equity, in relation to equitable titles, adopted, either by analogy, or by an application of the maxim *æquitas sequitur legem*, the time fixed by the statute as a bar at law, yet as the statute contained no provisions applicable to claims by a *cestui que trust* against the persons liable at law to their trustee, those courts could not, or would not, in relation to such claims, adopt in either way the statute as between the *cestui que trust* and those persons, but could only leave the *cestui que trust* and his title to the protection of the trustee, to be asserted by him through his legal title at law (a).

Since that statute as to —land and rent,

The 3 & 4 Will. 4, c. 27, however, in cases of claims to land and rent within section 1, gives referentially, by express enactment, to claimants in equity the same time, and with the same saving of disabilities, as to claimants at law; and therefore now, although a trustee may have lost his title to land or rent at law, his *cestui que trust* under disability may not necessarily have lost his title in equity.

In the case *Attorney-General v. Magdalen College, Oxon.* (b), Sir J. Romilly, M. R., said, it is very necessary to keep in view the distinction between a trustee and a *cestui que trust*. A trustee would in any case under the statute be barred from recovering the land

(y) See also 29 Beav. 190.

(z) *Pentland v. Stokes*, 2 Ball & B. 75.

(a) See *Wyck v. The East*

India Co., 3 P. W. 309; *In re Scott*, 8 Ir. Eq. Rep., N. S. 316.

(b) 18 Beav. 241.

after the twenty years had elapsed; but the *cestui que trust* would not be barred until the time prescribed by the act had elapsed after the period when he could have maintained a suit in equity The time which has elapsed might constitute a bar to prevent the trustee from suing, but would not necessarily do the same against their *cestui que trust*. The trustee for an infant or other person under disability may, by his own act, be disqualified from taking any step to recover the property of which he is a trustee, but this disqualification will not affect the *cestui que trust*, whose right to sue must be determined on its own ground, apart from the conduct or misconduct of the trustee (c).

Where the *cestui que trust* and the trustee have both legal interests, as where the latter has a term, and the former the legal freehold merely or the legal inheritance immediately expectant, then, practically though not theoretically, the *cestui que trust* may be barred by the possession of a third person operating as a bar to the trustee (d).

In cases of claims to advowsons and to the other sub- —advowsons,jects embraced by c. 27, not being land or rent, however, that chapter contains no saving of disabilities; and therefore, unless the saving of disabilities contained in the 3 & 4 Will. 4, c. 42, which is *in pari materia* with c. 27, can be extended to such cases (e), it would seem that in all such cases, wherever a trustee is barred of his legal right, the *cestui que trust*, although under disability, is also barred of his equitable right (f).

Charges upon land have been said to be not within —charges onthe section 25 of the chapter 27 (g). But Lord St. land.

(c) See also 6 H. L. C. 216; *Melling v. Leak*, 16 C. B. 652; *Quinton v. Frith*, Ir. L. R., 2 Eq. 898.

(d) See *Doe d. Jacobs v. Phillips*, 11 Jur. 692; see also *Garard v. Tuck*, 8 C. B. 231.

(e) See 2 Hare, 338.

(f) Vide *supra*, p. 268 *et seq.*

(g) See *Young v. Wilton*, 10 Ir. Eq. Rep. 10; *Knox v. Kelly*, 6 Ib. 285; *Hunt v. Bateman*, 10 Ib. 360; *Gyles v. Gyles*, 9 Ib. 135.

Leonards, after admitting the difficulty in applying the statute to charges upon land as distinct from the land itself, said, it is perfectly settled that the effect of a charge to be raised by express trust falls within the section 25 as much as an express trust of the land itself (*h*). If such charges be not within that section, they would seem to be equally excluded from the section 24. Therefore, in the case of a charge upon an estate vested in a trustee upon trust to raise such charge, if the right of the trustee to the estate be barred by the statute, the *cestui que trust* of the charge cannot enforce the trust for raising it (*i*), even though he was, when the bar to the trustee was complete, under disability.

So in the case of an annuity given to trustees for a charity, and the estate itself, subject to the annuity, given to other persons beneficially, and where time has operated against the trustees as a legal bar to the annuities, to relieve the charity in equity would probably be found difficult (*j*).

In *Hunt v. Bateman* (*k*), Pigot, C. B., said, the judgment of the court in that case involved no assent to the proposition, that if the right of the trustee to the estate devised to him in trust were barred by the Statute of Limitations, the *cestui que trust* of the charge could successfully rely upon the trust for the purpose of recovering it out of the lands. Equitable owners, as well as legal ones, by the section 24, and by reference, the preceding provisions, and, in cases of express trusts, by the section 25, under certain circumstances are now barred of their claims to land or rent, enjoyed against them by third persons. The equitable rights of such owners, distinguished from those equitable rights arising under express trusts, are the subjects of

(*h*) *Burrowes v. Gore*, 6 H. L. C. 907.

(*i*) See 2 De Gex, M. & G. 597; 10 Ir. Eq. Rep. 360.

(*j*) Per Sugden, L.-C., 2 Jo. & L.A. T. 198.

(*k*) 10 Ir. Eq. Rep. 360.

the former section, and their equitable rights under such trusts are the subject of the latter section (*l*).

Whether *cestuis que trust* under express trusts claiming adversely *inter se* are within the section 24, or whether, as between or amongst themselves, the section 25 controls and enlarges the operation of the former section, seems to be, at least, questionable. *Cestuis que trust inter se.*

In *Burroughs v. M^cCreight*(*m*), lands were vested in trustees in trust for five persons in common in fee, but the trustees never acted, and four of the five *cestuis que trust* received the whole of the rents for more than twenty years, and were held to have acquired a title to the whole estate notwithstanding the express trust. And in *Knight v. Bowyer* (*n*), Sir John Romilly, M. R., seemed to think that the receipt by one of several *cestuis que trust* of the whole of the profits would be adverse to the rest, and, if for a sufficient period, would be a bar to the others; and in the same case, on appeal to the Lords Justices(*o*), it was argued for the appellants, that the sect. 25 applies only as between the *cestui que trust* and the trustee, and not as between *cestui que trusts*, although under an express trust, where some have received to the exclusion of others; but, said Turner, L. J., "the contrast between the 24th and 25th sections points, I think, to the opposite conclusion. The case between the *cestui que trusts* would have fallen within the 24th section, if uncontrolled by the proviso(*p*). That section furnishes the general rule as to equitable estates, and the proviso being general, it is reasonable, I think, so to construe it as to except, where there is an express trust, all the cases which would otherwise have fallen within the general rule. The reasonableness of this construction appears more strongly when we consider what would be the re-

(*l*) 4 Hare, 155.

(*m*) 1 Jo. & Lat. 290.

(*n*) 23 Beav. 601.

(*o*) 2 De Gex & J. 421.

(*p*) Sect. 25.

medies in the case of an express trust. If the right against the trustee is preserved, as it undoubtedly is, there would be the consequent right to a receiver, and how could the right to a receiver be maintained if the section be construed to create a bar as between the *cestui que trusts*? I do not see how, in that case, the land or rent could be recovered at law. Besides, it is not very reasonable to suppose that the remedy was intended to be preserved against the trustee, but destroyed against the persons who had received the benefit of the breach of trust." In the case last noticed, the suit was by one *cestui que trust* against the others, and also against the trustee; and the receipt of the rents by such one was not of sufficient duration that it would have, if it could have, conferred a title.

It is also to be observed, that the possession of one or more of several *cestuis que trust* is the possession of all of them (*q*); that the possession of any or all of them is the possession of and under, and their acts, when adopted by the trustee, are the acts (*r*), and if none of them be in possession, but some be merely permitted to receive the rents or otherwise to deal with the property in the possession of tenants, they are the agents or bailiffs, of the trustee (*s*); that the possession of the trustee is the possession of all the *cestuis que trust* (*t*); and therefore the possession, the receipt, and other acts and dealings of or by some of the *cestuis que trust*, are the possession, the receipt, and other acts and dealings of and by all of them.

It would therefore follow, that in all cases of express trust, where some one or more of several *cestuis que trust* has or have held, or received the rents of, or other-

(*q*) Vin. Ab. tit. "Possession," (C) 8.

(*r*) *Faussett v. Carpenter*, 2 Dow & C. 232; 7 Bing. 599; 4 Hare, 417; *Garrard v. Tuck*, 8 C. B. 231; *Knight v. Bowyer*, 23 Beav. 609; 2 De Gex & J. 421.

(*s*) *Melling v. Leak*, 16 C. B.

652; see also *Jenkins v. Milford*, 1 Jac. & W. 629.

(*t*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633; *Chalmer v. Bradley*, 1 Jac. & W. 67; 30 Beav. 175; 9 Ir. Eq. Rep., N. S. 140, 472; *Lister v. Pickford*, 11 Jur., N. S. 649; 13 W. R. 827.

wise dealt with, in exclusion of the other or others, the trust property, the rights of the latter are preserved by the 25th section, even against the assignee of the former, although for value.

The mere wrongful receipt from express trustees by a stranger of the rents of the trust estate for more than twenty years is no bar to the *cestui que trust*. Thus, such trustees taking possession of lands and paying the rents to a person, whom they erroneously supposed to be the *cestui que trust*, for more than twenty years after the right of the person rightfully sustaining that character accrues, their possession is the possession of the latter person, and such receipt by the former is no bar to his right (*u*).

Cestui que trust not affected by receipt of rents by a stranger from the trustee.

The legal estate in property was vested and outstanding in a trustee, and the equitable owner of it died intestate in 1818. A person having no title entered into possession of it and received the rents and profits thereof for eighteen years and a half. On his death another person, being as little entitled as himself, entered into possession and received the rents for one year and a half more. After this, for four years, the tenants refused to pay their rents to any one, and they alone were in possession; at length, after the lapse of twenty-four years from the death of the equitable owner, the trustee filed a bill claiming no interest therein himself, but praying the court to ascertain and declare who were the persons entitled to the property, and the court takes possession of the property accordingly by its receiver. The court cannot keep the possession for itself, and has to determine who is the person entitled. The statute, although it imposes a bar to the institution of a suit after twenty years to recover possession, imposes no bar to the court declaring who is entitled to an estate in the possession of the court itself (*v*).

Nor by the possession by several persons successively for less than twenty years.

(*) *Lister v. Pickford*, 18 W. R. 827; 11 Jur., N. S. 649, S. C. (v) *Dixon v. Gayfore* (No. 1), 17 Beav. 421.

Whether right
acquired under
2 & 3 Will. 4,
cc. 71, 100,
against a
trustee be valid
against *cestui
que trust* also.

The operation of the statutes 2 & 3 Will. 4, cc. 71 and 100, on the matters embraced by them, as between trustee and *cestui que trust* on the one hand and third persons on the other hand, whether the right when valid at law as against the trustee is also valid in equity as against the *cestui que trust*, may involve some nice questions.

These two statutes are Statutes of Limitations, and are *in pari materia* with, but operate differently from, the 3 & 4 Will. 4, c. 27 (*x*). One of the principal subjects of the chapter 27 is the corpus of land itself when claimed by one or more person or persons, not having the possession of it, against another person or other persons having that possession. But the subjects of the cc. 71 and 100 are rights, not to land itself, but in, over or upon land, and not claimed by one person against another person, as distinct from and independent of the land itself, but by one person against another person not having the same rights, but having the land itself in, over or upon which such rights are claimed, and those rights not adverse to but consistent with the possession of the land by another person (*y*).

The section 7 in c. 71, and the corresponding section 6 in c. 100, would seem to embrace only those cases where the persons under the disabilities mentioned in those sections are the legal owners of the land in, over or upon which the right may be claimed, and not those cases where such persons are merely equitable owners of the land; and it would seem that when, in any case, the right is valid against the legal owners of the land, the right is also valid against the equitable owners also, although under any of such disabilities.

When the person must be
in *esse*.

The persons to whom a right accrues must be in *esse* when it *first* accrues, and until in *esse* they are not within the operation of the law (*z*). Those persons who

(*x*) Ante, p. 61; post, Chap. X.

(*y*) See 1 Jones' Ir. Rep. 127.

(*z*) *Att.-Gen. v. Perse*, 2 Dru. & W. 67; *Webster v. Webster*, 10

come into *esse* after the accruer are not regarded (*a*). For, except in the case of the Crown (*b*), when the law once begins to operate, the operation is not in general suspended because of there being no person against whom it can operate (*c*).

The 3 & 4 Will. 4, c. 27, however, has an exception in one case, namely, where an administrator claiming the estate or interest of an intestate is appointed after the right accrues (*d*), and, as will be shown in the next chapter, when the right is in chattels *real*. Administrator when affected.

In all cases of claim to chattels personal or otherwise, not in the nature of chattels real, the law will affect an administrator from the time only when he obtains the administration (*e*), for, *ex necessitate*, his title cannot commence *instante* (*f*). He derives it from the administration (*g*), and only from the time of the grant the property of the intestate vests in him (*h*). Sometimes, indeed, the grant in support of right, but not of wrong, has relation to the death of the intestate (*i*), and as well in the case of chattels real as chattels personal, although in the case of chattels real entry thereon is first necessary (*j*).

Where a person is sole next of kin of an intestate, and has, therefore, the power, at any moment after becoming so, to clothe himself exclusively with the legal character and rights of an administrator, he may, for

Ves. 93; *Douglas v. Forrest*, 4 Bing. 686; *Fairclaim v. Little*, 5 B. & Ald. 214; *Murray v. East India Co.*, Ib. 204.

(a) 15 Ir. Law Rep. 270.

(b) *Supra*, p. 244.

(c) *Cotterell v. Dutton*, 4 Taunt. 826; *Penny v. Brice*, 18 C. B., N. S. 393; *Freaks v. Cranefeldt*, 3 Myl. & C. 499; *Rhodes v. Smethurst*, 4 Mee. & W. 63.

(d) Sect. 6.

(e) *Stanford's case*, cit. Cro. Jac. 61; *Cary v. Stephenson*, 2 Salk. 421; *Fairclaim v. Little*,

supra; *Murray v. East India Co.*, *supra*; *Perry v. Jenkins*, 1 Myl. & C. 118.

(f) 1 Sch. & Lef. 289.

(g) *Wankford v. Wankford*, 1 Salk. 301; 1 Adol. & El. 49.

(h) *Wolley v. Clark*, 5 B. & Ald. 744.

(i) *Rea v. Inhab. of Horsley*, 8 East, 410; *Lyons v. Muldarry*, Hayes, Ir. Rep. 530; *Patten v. Patten*, Alcock & Nap. Ir. Rep. 493; *Elliott v. Kemp*, 7 Mee. & W. 306; 8 Ex. 305, 307.

(j) *Barnett v. Earl of Guildford*, 11 Ex. 19.

some purposes at least, become the owner of a chattel real of the intestate before obtaining the actual grant of administration (*k*).

Executor who when the right accrues has not taken probate.

The enactment just noticed will be observed to embrace an administrator only, and not the case of an executor who, when the right accrues, has not proved the will of his testator. In this latter case, as before the statute, when the right accrues after the death of the testator, the law does not operate against the executor until he has proved the will (*l*). For although his title is derived from the will, and not from the probate (*m*), and the property of the testator vests from his death in the executor (*n*), yet his title depends on his taking upon himself the administration of the will, and therefore does not commence *instantly*, but by his subsequent act (*o*), that is, proving the will; and the probate (*p*), or other proof tantamount thereto of the admission of the will in the spiritual court (*q*), is the only evidence of his title, and has relation to the death of his testator (*r*).

Representative of person against whom right may be enforced non-existing.

But when the right has accrued, the law, notwithstanding the non-existence afterwards of a representative of the person against whom the right may be enforced, continues to operate against the person to whom it has accrued (*s*); and the executor of the former person will have, without having obtained probate of the will, the benefit of the time which has elapsed (*t*).

If, however, the person to whom the right accrues

(*k*) See *Rea v. Inhab. of Horsley*, 8 East, 405.

(*l*) *Webster v. Webster*, 10 Ves. 93; *Douglas v. Forrest*, 4 Bing. 686; *Storey v. Fry*, 1 You. & Coll. N. C. 603; *Flood v. Paterson*, 29 Beav. 295.

(*m*) *Graysbrook v. Fox*, Plowd. 275; *Hensloe's case*, 9 Co. 38 a; *Comber's case*, 1 P. W. 767.

(*n*) *Ib.*; *Wolley v. Clark*, 5 B. & Ald. 744.

(*o*) 1 Sch. & Lef. 280.

(*p*) *Rea v. Netherseal*, 4 T. R. 260; *Pinny v. Pinny*, 8 B. & C. 335.

(*q*) *Williams' Executors*, part i. book iv. c. i. s. i.

(*r*) *Graysbrook v. Fox*, Plowd. 281; *Allen v. Dundas*, 3 T. R. 125.

(*s*) *Rhodes v. Smethurst*, 4 Mee. & W. 42; *Freaker v. Crane-feldt*, 8 Myl. & C. 499.

(*t*) *Rhodes v. Smethurst*, 4 Mee. & W. 42.

proceeds to enforce it, and before the action or suit is determined the defendant dies and no representative of the defendant is in existence for more than twenty years after his death, the right will not be affected, but the operation of the time of limitation will be suspended until the existence of such a representative; for there would be great hardship and unreasonableness in holding that time runs against a person who can do nothing to prevent it, and saying, that though there is no person in existence who can be sued, yet because the statute has run for a day or a month, during which there was a person who was sued, it still continues to run (*u*).

In 1818 a bill was filed for an account. In 1819 the plaintiff died intestate, and, subsequently to 1830, administration to his effects was obtained. In 1827 the defendant died intestate, and administration to his effects was obtained, but when does not appear. No proceedings in the original suit, after the death of the plaintiff, until 1835, were taken, but it was not dismissed, and in March, 1835, the record of the cause was removed from the Court of Great Sessions in Wales into the Court of Chancery, and in April following a bill of revivor and supplement was filed by the representative of the original plaintiff against the real and personal representatives of the defendant, who pleaded the Statute of Limitations (*x*). The bill was merely a continuation of the original suit, and not a new suit, and Sir John Leach, M. R., said the case depended on *Murray v. The East India Company*, and disallowed the plea (*y*).

There must also be at least two persons in every case within the law, each claiming an interest adverse to the other (*z*), and not the same interest or estate, as in the

Must be at least two persons each claiming ad-

(*u*) *Sturgis v. Darell*, 4 Ex., N. S. 622, affirmed on error, 6 Ib. 120.

(*x*) 21 Jac. 1, c. 16.

(*y*) *Perry v. Jenkins*, 1 Myl. & C. 118.

(*z*) *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Tottenham v. Byrne*, 12 Ir. L. R. 376; 15 Mee. & W. 622; 15 Ir. L. R. 284; 6 H. L. C. 963; *Burrell v. The Earl of Egremont*,

versely to the other.

cases of guardian and ward (*a*), trustee and *cestui que trust* (*b*), in cases of landlord and tenant (*c*), and in cases of mortgagor and mortgagee (*d*), whilst these several relations are subsisting.

Persons under disability have an extension,

It may be observed that where the person to whom a right to any land or rent has accrued is at the time when the right accrues under disability, the operation of the law is not suspended on account of the disability, but commences from that time, and not from the time when the disability determines, and the disability entitles the person under it to an extended period of time within which to assert the right (*e*).

—or an exclusion of the time of it.

But where the rights of the nature of those which are the subjects of the 2 & 3 Will. 4, cc. 71 and 100, are claimed in, to, over or against lands of persons under disability, and which, after the periods fixed by those acts, are not made absolute and indefeasible, the time during which the disability existed is excluded from the computation of the different periods of time during which the right, as against those persons, is claimed (*f*).

SECTION III.

Persons between whom exists a special Relation which excludes or modifies, as between them, the Operation of the Law.

Persons in special relations.

The persons between whom the question of ownership arises may stand to each other in some special relation, which may either altogether exclude or only qualify the

7 Beav. 205; *Lord Carberry v. Preston*, 13 Ir. Eq. Rep. 455; *Knight v. Bowyer*, 23 Beav. 635.

(*a*) *Morgan v. Morgan*, 1 Atk. 489; *Donner v. Fortescue*, 8 Ib. 129; 3 De Gex, M. & G. 815; *Thomas v. Thomas*, 2 Kay & J. 79; *Pelley v. Bascombe*, 9 Jur., N. S. 1120.

(*b*) *Garrard v. Tuck*, 8 C. B. 231; *Knight v. Bowyer*, 23 Beav.

635.

(*c*) *Supra*, p. 104 *et seq.*

(*d*) *Raffety v. King*, 1 Keen, 604; *Hyde v. Dallaway*, 2 Hare, 528; *Wynne v. Styant*, 2 Phill. 803.

(*e*) See 3 & 4 Will. 4, c. 27, ss. 16—19; *Thomas v. Thomas*, 2 Kay & J. 79.

(*f*) C. 71, s. 7; c. 100, s. 6.

operation of the law as applied to persons between whom no such relation exists.

The first special relation we notice is that of persons Joint owners. having a joint ownership, as joint tenants, parceners, and tenants in common. Joint tenants and parceners differ from tenants in common in possessing the common characteristic of unity of title and of interest, but all the three classes possess the one common, and, for our present purpose, the primary, characteristic of privity of possession (*f*).

These joint ownerships arise either by contract or by Origin. act of law, and cannot be created by disseisin (*g*); for no person can be disseised of an undivided part of an estate (*h*), or of any fraction of such a part (*i*). Therefore when two persons enter on land, one having title and the other having none, the possession is in him who has the right (*k*), and the bare perception of profits by the two, in moieties for twenty years, gives no title to him who had none before (*l*).

Before the 3 & 4 Will. 4, c. 27, the mere claim and the receipt of the whole of the profits, by one of these joint owners before entry, did not affect the possession of the others of the same class (*m*). For *primâ facie* the receipt by one was for all and according to the right, and he must show that the receipt was for himself only (*n*). Effect, before 3 & 4 Will. 4, c. 27, of claim of and taking all profits,

Inasmuch, also, as an entry upon land generally is —and of entry by some only. always taken according to right (*o*), an entry by any one person of any of these classes of joint owners was, in the absence of evidence to the contrary, an entry for

(*f*) Co. Litt. 169 a, 189 a; Cru. Dig. tit. xviii., xix., xx.

(*g*) Plowd. 283; Salk. 428.

(*h*) *Reading v. Royston*, 2 Salk. 423.

(*i*) Burt. Comp. 397. See *Doe d. Blight v. Pitt*, 11 Ad. & E. 842.

(*k*) 1 Salk. 246; 2 Ib. 423;

Hob. 322; 2 Ex. 821.

(*l*) *Reading v. Royston*, 2 Salk. 423.

(*m*) Co. Litt. 243 b, 273 b, 874 a.

(*n*) 1 East, 577, 578.

(*o*) *Smales v. Dale*, Hob. 120; Plowd. 233.

all the others of the class (*p*), and after such entry the possession of the one so entering was the possession of all the others of the same class (*q*), and not adverse to them (*r*); and after such an entry, neither the taking of the whole profits by any one of these joint owners without accounting to the others for their shares (*s*), nor any mere claim of the whole (*t*), nor such taking and such claim together (*u*), affected the possession of the others. But the mere receipt of the whole of the profits by one of these joint owners, for a period of forty years without any claim by the others, was deemed a sufficient acquiescence of the others in the receipt, as, under an adverse holding, to warrant the presumption by a jury of an actual ouster of and a bar to the others (*x*).

An entry, however, by one of these joint owners claiming the whole and taking the profits of the whole divests, in law, the freehold of the other (*y*). For claiming the *whole* and denying possession to the other is beyond the mere act of *receiving* the whole rent, which is equivocal (*z*).

As to advow-
sons.

The seisin or possession of an advowson consists in presenting a clerk to fill the church, and until a presentation by the person claiming the advowson, his possession is but a *quasi* possession or a possession in law (*a*), and he cannot be deprived of it otherwise than by admission and institution upon an usurpation by a presentation to the church, and not by collation of the bishop (*b*).

(*p*) Litt. s. 398; Co. Litt. 243 b, 373 b; Hob. 120; *Doe d. Reed v. Taylor*, 5 Ad. & E. 575.

(*q*) *Ford v. Grey*, 1 Salk. 285; 6 Mod. 44; *Davenport v. Tyrell*, 1 Bl. 675; *Doe d. Thorn v. Phillips*, 3 B. & Ad. 753; *Doe d. Fishar et al. v. Prosser*, Cowp. 217; *Peaceable v. Read*, 1 East, 568.

(*r*) *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008.

(*s*) Litt. s. 398; Co. Litt. 243 b, 373 b, 374 a; *Fairclain v.*

Shackleton, 5 Burr. 2604; 2 Salk. 423; 2 Atk. 632; *Doe v. Hulse*, 5 B. & C. 757.

(*t*) *Smales v. Dale*, Hob. 120.

(*u*) Co. Litt. 243 b, 273 b.

(*x*) *Doe d. Fishar et al. v. Prosser*, Cowp. 217; 1 East, 575.

(*y*) Co. Litt. 273 b; *Doe d. Fishar et al. v. Prosser*, Cowp. 217.

(*z*) Per Cur. *Doe d. Hellings v. Bird*, 11 East, 51.

(*a*) Co. Litt. 29 a.

(*b*) Ib. 344 b.

In the case of an advowson vested in joint tenants (*c*), and tenants in common (*d*), all of them respectively should join in the presentation. But vested in coparceners, if they cannot agree to present, they (*e*) and their assignees (*f*) present according to seniority of age of the coparceners.

The presentation, however, by one of two joint tenants (*g*), or tenants in common (*h*), or parceners (*i*), and the admission of the clerk so presented, does not affect the possession of the other joint owner. But if, as they may (*k*), they make partition to present by turns every one is to be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn (*l*).

Effect of presentation by one only.

If a next presentation be derived from one of several coparceners, and before it arrives, the one from whom it is derived and some of the others usurp the turns of some of the other coparceners, those usurpations will not affect the right to such presentation in the order in which, but for such usurpations, it would have been reckoned, but in determining it such usurpations will be counted as turns. Thus, where an advowson vested in four coparceners, and on the seventh turn, which belonged to the third daughter, arriving, she being dead, leaving two coheirs, a dispute as to the right to present arose between them. The younger of the two, pending a *quare impedit* between them, presented, and on the death of the clerk so presented the elder of these two presented, and on the next vacancy the persons claiming under the youngest of the four coparceners presented.

(*c*) *Wilson v. Kirkham*, 1 Ves. 413; 7 B. & C. 296.

(*d*) 2 Roll. Ab. 372.

(*e*) Co. Litt. 166 b; Plowd. 333.

(*f*) 2 Inst. 365; *Buller v. Bishop of Exeter*, 1 Ves. 340; Willes' Rep. 663.

(*g*) 1 Inst. 186 b; 2 Ib. 365.

(*h*) 2 Roll. Ab. 372.

(*i*) 18 Edw. 1, c. 5; 1 Inst. 243 a; 2 Ib. 365; 2 Roll. Ab. 346; see also *Barker v. Lomax*, Willes' Rep. 659, 1 H. Bl. 412; 10 B. & C. 607.

(*k*) *Bishop of Sarum v. Philips*, 1 Ld. Raym. 535.

(*l*) 7 Anne, c. 18, s. 2.

The last presentation was held to be the tenth (*m*), and the next was held to be the eleventh and to belong to the younger of the two coheirs of the third coparcener (*n*).

The position
of such owners
inter se since
c. 27, as to
—land and
rent,

Since the 3 & 4 Will. 4, c. 27, however, this relation in connection with our present subject and as regards land and rent within the meaning of the section 1, has been deprived of those advantages and privileges, and the persons placed in this relation are now in the same position *inter se* as strangers (*o*).

But where one of these joint owners holds under a lease the undivided shares of the other owners, but by paying no rent reserved by the lease takes all the profits for twenty years, he acquires no title to such shares, whether the right be legal or equitable (*p*).

—advowsons.

This relation, however, when subsisting in respect of advowsons still remains in all its force. For the section 12 applies to land and to rent only. Advowsons are the subject of special enactments, without any one corresponding with that section.

But this is to be understood as applicable in those cases only where no partition has been made between any of these joint owners to present in turns. Where any such partition has been made they are severally seised (*q*), and the presentation by one only on the turn of another would be an usurpation, and adverse to the possession of the other.

Guardian and
ward.

The next special relation we notice is that of guardian and ward. Whilst this relation continues, the guardian or any person claiming under him (*r*) cannot acquire

(*m*) See *Pyke v. Bishop of Bath and Wells and Lindsey*, 4 Bac. Ab. tit. "Joint Tenants," H. 1.

(*n*) *Richards v. The Earl of Macclesfield*, 7 Sim. 257; 4 L. J., N. S., Eq. 153, *S. C.* See also *Gully v. Bishop of Exeter*, 10 B. & C. 584.

(*o*) Sect. 12; *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008; *Stewart v. Marquis Conyngham*,

1 Ir. Eq. Rep. 634; *Lessee O'Sullivan v. M'Swiny*, Longf. & T. 111; *Doe v. Horrocks*, 1 Car. & K. 566; *Doe d. Jacobs v. Phillips*, 11 Jur. 692; *Murphy v. Murphy*, 15 Ir. L. R. 205; 9 H. L. C. 360.

(*p*) *Archbold v. Scully*, 9 H. L. C. 360.

(*q*) 7 Anne, c. 18, s. 2.

(*r*) *Quinton v. Frith*, Ir. L. R. 2 Eq. 396.

adversely to his ward any title to the lands of the latter. And the unbroken continuance of the management of the property by the guardian after the ward has attained majority is in effect a continuance of the guardianship as to the property (*s*).

This is so not only in the case of guardians proper, but also in the case of *quasi* guardians, although perhaps quite to the same extent. Any person, whether a relative or a stranger, but not being in the position of a legal guardian (*t*), entering upon and receiving without authority the rents and profits of the estate of an infant is, during the minority of the infant, *quasi* guardian (*u*); and if the entry and receipt be continued after the infant has attained majority is thenceforth *quasi* bailiff of the infant (*x*), or a trustee for him, and may be treated by the infant having the legal estate as a trespasser, and is liable, in an action of trespass for mesne profits, for all the profits accrued during the minority of the infant (*y*). And the person so entering cannot set up any other title to the lands (*z*) than *quasi* guardian or *quasi* bailiff. In equity such person may be treated, at the election of the owner, after attaining majority, either as bailiff or as guardian or as trustee (*a*). But such owner electing to take his equitable remedy must take it upon equitable terms. If, therefore, the entry was with other persons jointly he must pursue his

(*s*) 1 Sim. & S. 145.

(*t*) See Co. Litt. 88 b *et seq.* and notes; Treat. Eq. book ii. pt. ii. c. ii. s. 2, n. (*h*).

(*u*) Litt. s. 124; Co. Litt. 89 b; Com. Dig. tit. Accompt (A. 2) 2; Fitzh. N. B. 117 b, 118; *Morgan v. Morgan*, 1 Atk. 489; *Dormer v. Fortescue*, 3 Ib. 129; *Thomas v. Thomas*, 2 Kay & J. 79; *Pelley v. Bascombe*, 4 Giff. 390.

(*x*) Litt. s. 124; Co. Litt. 90 a; Com. Dig. tit. Accompt (A. 3) 2; 2 Inst. 880; Fitz. N. B. 118; 4 Giff. 395; *Dormer v. Fortescue*,

supra; 2 P. W. 645; *Griffin v. Griffin*, 1 Sch. & Lef. 352; 3 De Gex, M. & G. 815; 2 Ven. 342; *Blomfield v. Eyre*, 8 Beav. 250; *Boddy v. Lefevre*, 1 Hare, 602, n.; *Wyllie v. Ellice*, 6 Hare, 505.

(*y*) 3 De Gex, M. & G. 801; 6 Hare, 512.

(*z*) Litt. s. 124; *Thomas v. Thomas*, 2 Kay & J. 79.

(*a*) *Blomfield v. Eyre*, 8 Beav. 250; *Wyllie v. Ellice*, 6 Hare, 505. See also *Quinton v. Frith*, Ir. L. R., 2 Eq. 396.

remedy against all the persons jointly liable by reason of such entry (*b*). The equitable remedy enables the owner to obtain, more easily than at law, the discovery upon oath of books and papers (*c*).

When *quasi* relation arises.

This *quasi* relation arises not only where the possession is assumed without title, but also where it has been under an adverse judgment recovered at law, and where it has been taken by mistake on a supposed title (*d*).

Difference in equity between entry of a relation and of a stranger.

In equity, however, it seems that the entry by a relation is totally different from that of a mere stranger (*e*). This difference would seem to be not in the nature of the character attributed to them, but only in the extent of the liability, in point of time and amount, to the award; e. g., the account of profits, in equity at least, may be directed more readily and for a longer period against a relation than against a mere stranger (*f*).

How far receipt of profits of infant's estate a trust and within 21 Jac. 1, c. 16,

This receipt of the profits of the estate of an infant is not such a trust in the view of a court of equity as that after the lapse of six years from the termination of the minority, or the waiver of an account within that period (*g*), an action or suit by the infant for an account will not be barred by the Statute of Limitations, 21 Jac. 1, c. 16 (*h*); and, if a suit in equity for an account be within the statute, is so only by analogy to the action of account at law, and in that proceeding the case of infancy is saved. That statute therefore would be no bar to such a suit for the account for the whole period of the infancy during which the right accrued, although for more than six years before the commencement of

(*b*) *Wyllie v. Ellice*, 6 Hare, 505.

(*c*) *Lockey v. Lockey*, Pre. Ch. 518.

(*d*) See *Hicks v. Sallitt*, 8 De Gex, M. & G. 782; *Blomfield v. Eyre*, 8 Beav. 250.

(*e*) *Thomas v. Thomas*, 2 Kay & J. 79. See also *Pelley v. Bascombe*, 4 Giff. 390.

(*f*) See *Morgan v. Morgan*, 1 Atk. 489; *Thomas v. Thomas*, supra; *Pelley v. Bascombe*, supra.

(*g*) *Morgan v. Morgan*, 1 Atk. 489.

(*h*) *Lockey v. Lockey*, Pre. Ch. 518. See also 2 Sch. & Lef. 633.

the suit, instituted within six years after the termination of the minority (*i*).

Such a suit, however, is neither a suit for the recovery of rent within the meaning of the earlier sections of the 3 & 4 Will. 4, c. 27, nor a suit for the recovery of arrears of rent within the 42nd section of the same chapter, but only a suit by an infant, upon attaining twenty-one, against his guardian for an account, and that statute does not at all affect such a suit (*k*). —and 3 & 4 Will. 4, c. 27.

But even if the latter statute affected such a suit the consequence would not follow that because the infant might treat the stranger as his bailiff for the purpose of enforcing the accounts, the infant may in all cases so treat him for the purpose of escaping from the effect of this statute. That is open to considerable argument, especially as that statute provides that ten years only shall be allowed after the termination of the disability of infancy for the person who has attained majority to assert his rights; a provision which, it has been justly observed, must be rendered altogether nugatory if it be held that in every case where a stranger enters upon an infant's estate he enters as bailiff, because if that were so time would not begin to run against the infant until he attained twenty-one (*l*).

It would seem, then, that the possession of the lands of an infant by his legal guardian, or by a relative in the position of a *quasi* guardian, although for more than twenty years after the minority has ceased, will not confer on such guardian any title to the lands against and adversely to the ward; but that the possession of them by a *quasi* guardian of, but who is a stranger to, the infant, for twenty years and upwards, will confer on such a guardian a title to the lands against and adversely to his ward (*m*). Result as to this relation.

(*i*) *Hicks v. Sallitt*, 3 De Gex, M. & G. 782. Gex, M. & G. 816.

(*l*) 2 Kay & J. 83.

(*k*) Per Turner, L. J., 3 De

(*m*) See *Thomas v. Thomas*,

Trustee and
cestui que
trust.

The next special relation we notice is that of trustee and *cestui que trust*. Although the trustee has the legal interest and the *cestui que trust* has not, at law, any interest, and both together are considered in equity, in relation to strangers, as one person (*n*); yet as between the trustee and the *cestui que trust* themselves they are, in equity, treated as distinct persons, and the trustee is regarded as the protector of not only the original *cestui que trust* (*o*) and his interest, but also all persons claiming his interest through him (*p*) and their interests. This relation is of more or less force, and is less or more easily determined, as the trust under which it originates is expressed or implied. For a vast difference exists between things to which the denomination of trust is given (*q*).

Creation in
cases of ex-
press trust of
—realty,

This relation in cases of express trust is created by act of parties, and, when concerning lands, tenements and hereditaments (*r*), whether copyholds (*s*), freeholds (*t*) or perhaps leaseholds (*u*), and when the trusts do not arise or result by the implication or construction of law on conveyances (*x*), or are not transferred or extinguished by act or operation of law (*y*)—and these are said to be only trusts and equitable interests (*z*)—the trust, that is, the evidence and recognition of the trust itself merely, and not the origin of the transaction in which the trust was created (*a*), must be declared by writing signed by the party enabled to declare it. But in the instrument declaring the trust, when formally

supra; *Pelley v. Bascombe*, supra; and other cases cited in this section.

(*n*) Supra, p. 268.

(*o*) 4 Bli. 96; 3 De Gex, F. & J. 73.

(*p*) *Knight v. Bowyer*, 23 Beav. 610, on app.; 2 De Gex & J. 421; *Re Lowe's Sett.*, 30 Beav. 95.

(*q*) 4 Bli. 96.

(*r*) 29 Car. 2, c. 3, s. 7.

(*s*) *Withers v. Withers*, Amb.

151.

(*t*) *Leman v. Whitley*, 4 Russ. 423; *Dale v. Hamilton*, 2 Phill. 266.

(*u*) *Riddle v. Emmerson*, 1 Vern. 108.

(*x*) *Davies v. Otley*, 12 L. T. R., N. S. 789.

(*y*) 29 Car. 2, c. 3, s. 18.

(*z*) *Lamplugh v. Lamplugh*, 1 P. W. 111.

(*a*) 18 Ves. 74; 2 Jo. & Lat. 690; 2 Phill. 275.

and technically prepared, the word "trust," although generally used, is not necessary (*b*); and accordingly repeated decisions have established, that words precautionary, recommendatory or expressing belief, and the like, where the property and the objects for whom it is intended are certain, create, by construction of courts of equity, trusts (*c*), which, although various writers have designated as implied trusts, are, it is submitted, all properly express trusts. When the relation is concerning pure personal estate, the trust, as before the statute, may be declared verbally (*d*). —personalty.

This relation may also arise not only between the person originally constituted the trustee and the persons beneficially interested, but also between any person taking from such original trustee (*e*) a conveyance of the property, either as a volunteer and with or without notice of the trust (*f*), or for value, but with direct notice of, and under circumstances not warranted by, the trust (*g*), but not with an artificial constructive notice (*h*) on the one hand, and the persons so interested on the other.

When persons taking from original trustee become trustees.

(*b*) *Halliday v. Hudson*, 3 Ves. 210; 2 Jo. & Lat. 197; *Att.-Gen. v. Dean and Canons of Windsor*, 23 Beav. 679. See also *King v. Denison*, 1 Ves. & B. 92; and the cases cited *Rop. Leg. c. 22, s. 6*.

(*c*) See *Cary v. Cary*, 2 Sch. & Lef. 189; *Paul v. Compton*, 8 Ves. 380; *Foley v. Parry*, 5 Sim. 138; 2 Myl. & K. 138; *Birch v. Wade*, 3 Ves. & B. 198; *Forbes v. Ball*, 3 Mer. 437; *Tibbets v. Tibbets*, Jac. 317; *Hart v. Tribe*, 18 Beav. 215; *Preceost v. Clarke*, 2 Mad. 458; *Meredith v. Henneage*, 1 Sim. 553, 555.

(*d*) *Bayley v. Boulcott*, 4 Russ. 345; *Bendow v. Townsend*, 1 Myl. & K. 506; *M^r Fadden v. Jenkyns*, 1 Phill. 153.

(*e*) *Mansell v. Mansell*, 2 P. W. 678; *Brandlyn v. Ord*, *supra*;

Snelling v. Squint, 2 Ch. Ca. 47; *Digby v. Morgan*, 1 Ch. Rep. 129; *Saunders v. Dehen*, 2 Vern. 271; *Pearce v. Newlyn*, 3 Mad. 187; *Woodyat v. Gresley*, 8 Sim. 180; *Scott v. Scott*, 4 H. L. C. 1065.

(*f*) *Mansell v. Mansell*, 3 P. W. 681; *Bell v. Bell*, Lloyd & G. 44; *The Commissioners of Donations v. Wybrants*, 2 Jo. & Lat. 182; 1 Ib. 304; *Sturgis v. Morse*, 8 De Gex & J. 1.

(*g*) *Att.-Gen. v. Christ's Hospital*, 3 Myl. & K. 344; *Hicks v. Sallitt*, 18 Jur. 915; 3 De Gex, M. & G. 782; *S. C., Thompson v. Simpson*, 1 Dru. & W. 459.

(*h*) *Bell v. Bell*, Lloyd & G. 44. See also *Stewart v. Marquis Conyngham*, 1 Ir. Eq. Rep., N. S. 534.

So if a purchaser for value take with notice that an unascertained and undefined portion of the property is subject to a trust, leaving the portion to be ascertained afterwards, the trustees would have a right to make out a title to so much at least of the property as in truth is subject to the trust; and if the purchaser take a conveyance of the entire property, with a knowledge of the claim of the trustees to some part, and that part not ascertained by metes and bounds, or by an express admeasurement, he cannot say that as to any specific part he is, upon his conveyance, a purchaser without notice (*m*).

When not on
so taking.

But a person taking a conveyance of trust property either from the trustee for value and without notice of the trust, or as a volunteer with, but from a purchaser for value from the trustee without, such notice (*n*), or without, but from a purchaser with (*o*), notice, except in the case of a charity (*p*), does not become a trustee. And where he acquires the legal title and has paid his money in ignorance of the right of another party, equity will not deprive him of the benefit of that title. If, however, he have only an equitable interest, the owner of a prior equitable interest will, in equity, generally be preferred, under the general rule *qui prior est tempore potior est jure* (*q*). But even when he has only an equitable interest, but is a purchaser of it for value and without notice, he will be protected in equity as well against a legal as against an equitable title (*r*).

Assuming to
act and acting
as a trustee.

A person may also become an express trustee by assuming to act and acting in or under an express trust (*s*).

(*m*) See *Att.-Gen. v. Flint*, 4 Hare, 147.

(*n*) *Harrison v. Forth*, Pre. Ch. 51; *Brandling v. Ord*, 1 Atk. 571; *Sweete v. Southcote*, 2 Bro. Rep. 66.

(*o*) *Ferrars v. Cherry*, 2 Vern. 384; *Mortins v. Joliffe*, Ambl. 313; *Peacock v. Burt*, App.

Coote, Mortg., 2 Ed. 693.

(*p*) *East Greenstead case*, Duke's Ch. Uses, 64.

(*q*) 4 Hare, 156.

(*r*) V. & P. 14th Ed. c. 25.

(*s*) See *Life Association of Scotland v. Siddal*, 3 De Gex, F. & J. 58.

The consideration in this relation originating in an express trust is, not only what was done, but what it was the duty of the trustee to do. It is the duty of the trustee to take care of the interest of the *cestui que trust*, and there are many cases in which the trustee is not permitted to do anything for his own interest adverse to the interest of the *cestui que trust* (*t*). The trust being express (*u*), and no doubt as to the origin and existence of it (*x*), and so long as the relation continues, and the only circumstance is, that the trustee does not perform the trust (*y*), the principles of justice and the interests of mankind require that lapse of time should not enable mere trustees to appropriate to themselves the property of others (*z*). This is the broad general rule.

The principle of the rule excluding a bar in this relation.

Even in cases of express trust, however, where a *cestui que trust* under no disability has had full knowledge of the trust and of his rights under it, and the trust has been for a long period repudiated by the trustee, and the *cestui que trust*, in relation to his rights, has been passive, and has acquiesced in the repudiation, a court of equity, under such circumstances, would refuse to assist the latter against the former (*a*).

When *cestui que trust* not assisted against his trustee.

This relation, in all cases of express trust of land or rent, has received, by the 3 & 4 Will. 4, c. 27, an important modification. Now, when land or rent subject to an express trust is conveyed for value by the trustee, even with direct notice of the trust, the relation of trust-

Modification of the rule in cases of express trust.

(*t*) 4 Bli. 96; 3 De Gex, F. & J. 73; 2 Rose, 412; 8 Hare, 220; 9 H. L. C. 376.

(*u*) *Mansell v. Mansell*, 3 P. W. 681; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607; 2 Jac. & W. 177; 2 Myl. & C. 309; 6 Hare, 531; *Wedderburn v. Wedderburn*, 2 Keen, 749; 4 Myl. & C. 53; 1 Drew. 393. See also *Att.-Gen. v. Fishmongers' Co.* 5

Myl. & C. 17.

(*x*) 5 Myl. & C. 17.

(*y*) 2 Sch. & Lef. 633; *Wedderburn v. Wedderburn*, supra.

(*z*) 5 Myl. & C. 17.

(*a*) *Harwood v. Oglander*, 6 Ves. 199; 8 Ib. 106; *Chalmer v. Bradley*, 1 Jac. & W. 67. See *Wedderburn v. Wedderburn*, supra. See also 3 De Gex, F. & J. 73; 2 De G. & J. 421.

tee and *cestui que trust*, as between the grantee and the *cestui que trust* (b), but not as between the trustee and the *cestui que trust* (c), is after the lapse of twenty years determined.

Effect of the modification.

The effect of section 25 is to save the right of the *cestui que trust* against the trustee, but not against purchasers for value from the trustee (d). This section, however, said Lord Wensleydale (e), is certainly not very happily expressed; but I suppose it means that the remedy of the *cestui que trust* for an abuse of an express trust vested in the trustee continues against him, and those claiming under him, though the estate is conveyed away, and is not barred by the expiration of the statutable period as against him, though as to the purchaser from him, for a valuable consideration, the right to sue begins from the date of the conveyance to the purchaser, and therefore is barred in ordinary cases by the expiration of twenty years from that time, and, where disabilities occur, by the expiration of the longer period allowed in such cases.

Purchaser for value may lose the advantage of the modification.

If before the period of limitation expire, a purchaser for value become an express trustee of the property, he cannot avail himself of the statute as a defence against a claim by his co-trustees on behalf of the *cestui que trust*, even after the period has expired, because that would be allowing the trustee to take advantage of the statute against his *cestui que trust*. The time would cease to run from the time of the purchaser thus becoming a trustee, or the trust would be then revived in him. And, although a jury might presume an ouster by such

(b) Sect. 25; *Mag. Coll. Oson. v. Att.-Gen.*, 6 H. L. C. 189; *Att.-Gen. v. Payne*, 27 Beav. 168; *Att.-Gen. v. Davey*, 4 De Gex & J. 186.

(c) Sect. 25. See *Att.-Gen. v. Flint*, 4 Hare, 147; *Petre v.*

Petre, 1 Drew. 393; 2 De Gex & J. 442; 6 H. L. C. 215; *Reed v. Feem*, 14 W. R. 704; *Quinton v. Frith*, Ir. L. R., 2 Eq. 396.

(d) 6 H. L. C. 211.

(e) *Ib.* 215.

trustee, so as to enable the other trustees to recover in ejectment, yet a court of equity will not, in the case of a charity at least, speculate what a jury might do under such circumstances, but is bound, as to him, to sustain its jurisdiction, and will enforce against him the trust (*f*). Thus a purchaser for value may lose the benefit of the protection to which, under this provision, he would have been otherwise entitled.

If, since this statute, a person acquire, and for twenty years be permitted to retain, the possession of land or rent held upon an express trust, but does not acquire them by conveyance from the trustee, the case would seem not to be within the section 25, but as to the trustee within the section 2, and as to the *cestui que trusts* within the section 24. Those equitable rights of *cestuis que trust*, which are distinguishable from their equitable rights under express trusts, are the subject of the section 24, whilst the latter rights are the subject of the section 25. By the former section the *cestui que trust*, after the lapse of twenty years, with an allowance for disabilities, if any, is barred; and if the claim be under the trustee and by a conveyance for value, the *cestui que trust*, after the same lapse, and with a like allowance, is equally barred (*g*).

Persons having possession, without conveyance, of land or rent held on express trust.

Since this statute volunteers, however, taking a conveyance of property subject to an express trust, either with or without notice of the trust, are still trustees and subject to the trust as before the act (*h*).

Taking conveyance as volunteers.

When this relation subsists with reference to either the inheritance of land or rent, or to a chattel interest carved out of it absolutely, or for raising out of the land or rent a charge upon it, the effect and result

The relation as respects third persons.

(*f*) See *Att.-Gen. v. Flint*, 4 Hare, 147.

(*g*) 6 H. L. C. 215.

(*h*) See *Bell v. Bell*, Lloyd &

G. 44; *Scott v. Scott*, 4 H. L. C. 1065; *The Commissioners of Donations v. Wybrants*, 2 Jo. & Lat. 182; *Sturgis v. Morse*, *supra*.

in any of these cases, as between the trustee and the *cestui que trust* themselves, would be the same. But as between them on the one hand, and third persons claiming the inheritance on the other hand, some important distinctions and considerations are to be noticed. Thus, in the case of a trust of the inheritance itself, or of the inheritance subject to a trust to raise out of it a charge thereon, the trustee at law, and the *cestui que trust* in equity, or the former only, may, after the requisite period, be absolutely barred. But in the case of the chattel interest in either of the supposed instances, the relation of *cestui que trust* is created, not only between the person beneficially entitled to such interest, and the person to whom it is immediately given, but also between the owner of the inheritance and this last person, and, therefore, the possession by such owner is the possession of such person, and as against him operates nothing, and consequently has no effect as against his *cestui que trust*, the person absolutely entitled to the term beneficially, or to the charge or upon the term on the charge itself (*i*).

In cases of charge,

In one case, however (*k*), the annuity and arrears were secured by an existing trust term, and yet, as against a subsequent incumbrancer, the claim for the arrears was limited to six years. But the arrears beyond that amount were claimed under the covenant to pay the annuity as a specialty debt, within the 3 & 4 Will. 4, c. 42, and not under the term and trusts. If the trustee of the term had entered he would have been entitled to raise for his *cestui que trust* the whole arrears (*l*). Lord St. Leonards, C., said he did not think the au-

(*i*) *Young v. Lord Waterpark*, 18 Sim. 202; *S. C.*, on appeal, 10 Jur. 1; stated more fully 6 Jur. 656; *Blair v. Nugent*, 9 Ib. 400; *Hunt v. Bateman*, 10 Ib. 360; *Cox v. Dolman*, 2 De Gex, M. &

G. 592; *Burrowes v. Gore*, 6 H. L. C. 907.

(*k*) *Hunter v. Nockolds*, 1 Mac. & G. 640.

(*l*) See *Cox v. Dolman*, *supra*.

thority of *Hunter v. Nockolds* could be quoted against that of *Young v. Lord Waterpark*(*m*); and Stuart, V.-C., said *arguendo*(*n*), that *Hunter v. Nockolds* is overruled by *Cox v. Dolman*, and referred to *Young v. Lord Waterpark*.

Although every charge imposes a burden, but may not create a trust(*o*), and a person with a mere naked authority to raise a charge on, but having no estate or interest in, land or rent is not an express trustee(*p*), within the 3 & 4 Will. 4, c. 27, yet a charge may be imposed upon property in such a way as to create, in the person taking the property, the obligation as a trustee of giving effect to the charge and also so as to create an express trust, and between such person and the person entitled to the charge, the relation of trustee and *cestui que trust*. Thus estates were devised to trustees and their heirs upon trust to convey such estates to A. for life, but subject to and charged with annuities in favour of charities, two of whom were corporations, and subject thereto to the first and other sons successively of A. in tail. Whether the estates are or are not conveyed the provision for the charities is an express trust, and the relation of trustee and *cestui que trust* between the trustees, or the beneficial devisees of the estates, and the annuitants, is created(*q*).

A resulting trust may be an express trust, under which this relation may originate. Thus, where the trusts expressly declared by an instrument do not exhaust the whole interest in the property, but the instru-

—when the relation is, and when it is not created.

The relation may originate under a resulting trust as an express one.

(*m*) See *S. C.* supra.

(*n*) *Blower v. Blower*, 5 Jur., N. S. 33.

(*o*) *Hughes v. Kelly*, 8 Dru. & War. 48; *Harrison v. Duignan*, 2 Ib. 295; *Francois v. Grover*, 5 Hare, 1; *Chappell v. Rees*, 1 De Gex, M. & G. 393; 16 Jur. 417; *Hunt v. Bateman*, 10 Ir. Eq. Rep. 360; *Dundas v. Blake*, 11

Ib. 188; *Dickenson v. Teasdale*, 81 Beav. 511; on app. 1 De Gex, J. & S. 52.

(*p*) *Dickenson v. Teasdale*, supra.

(*q*) *The Commissioners of Donations v. Wybrants*, 2 Jo. & Lat. 182. On this case see 6 H. L. C. 209.

ment, on the face of it, shows a trust resulting by operation of law, such resulting trust is an express one within the 3 & 4 Will. 4, c. 27, and under which this relation between the trustee and the person entitled by reason of that trust originates (*r*).

Salter v. Cavanagh.

The case of *Salter v. Cavanagh* was one of resulting trust, under a will, for the heir of the testator, and seems to have been decided mainly on the ground that as the trustee, in relation to the trusts expressly declared by the will, was an express trustee, and was not intended to be benefited, he must be considered, in relation to the resulting trust, not merely a constructive but an express trustee also.

Sir E. Sugden, L. C., referring to this case, said (*s*), "it seems to have been held that an implied trust is an express one within the act, where it arises upon the face of the instrument and is not to be made out by evidence; but upon this point I am not called upon to give any opinion."

And under express trusts of equitable interests.

The relation is of as much force in express trusts of equitable interests as in express trusts of legal interests. In the case of equitable interests, the legal estate being in other persons, the trustees cannot enter into possession of the property, but the principle is the same (*t*).

The relation, as to advowsons and other matters, not altered.

A purchaser for value of an advowson subject to an express trust, with direct notice of the trust, is, however, notwithstanding the 25th section, still liable to the trusts. For that section, in terms, embraces land and rent only, and these terms, according to the meaning assigned to them by the first section, do not include advowsons (*u*).

This relation in all cases of express trust of those subjects of property which are not embraced by the

(*r*) *Salter v. Cavanagh*, 1 Dru. & Wal. 687.
(*s*) 2 Jo. & Lat. 196.

(*t*) 23 Beav. 635; 29 Ib. 187.
(*u*) See ante, p. 62; post, Chap. III.

24th and 25th sects. of the 3 & 4 Will. 4, c. 27, also remains on the same footing as before this statute (*x*).

This relation, when originating under a trust not expressed but implied only, is, for our present purpose, of less force than when originating under an express trust. Effect of the relation under implied trusts.

Implied trusts are raised or created by act or construction of law (*y*). But the law never implies, the court never presumes a trust, but in case of absolute necessity (*z*). Even in the case of implied trusts, the supposition is that the whole intention, so far as it is committed to writing, is before the court. In such cases it may be right to hold, that a gift in one part of an instrument in terms which, if uncontrolled by the context, would give an absolute interest, shall not be reduced to a trust by equivocal expressions in another part of the instrument. But even this does not apply where the court has not the expressions of the donor before it for its guidance (*a*).

For the present purpose, these trusts may be divided into such as, independent of any intention, a court of equity, in case certain facts be established in evidence, may possibly and eventually declare against a person who claims to be, and *prima facie* is, the true owner, commonly designated constructive trusts (*b*); and such as are or may be founded on some supposed intention Which are of two classes.

(*x*) See *Phillipo v. Munnings*, 2 Myl. & C. 809; *Obeo v. Bishop*, 1 De Gex, F. & J. 137; *Marquis Clanricarde v. Henning*, 80 Beav. 175; *Duke of Leeds v. Earl Amherst*, 2 Phill. 117; *Evans v. Bagwell*, 2 Con. & L. 617; *Tyson v. Jackson*, 30 Beav. 384; *Prior v. Hornblow*, 2 Y. & C. 200; *Dimsdale v. Dudding*, 1 Y. & C. N. C. 265; *Brittlebank v. Goodwin*, 16 W. R. 696; 37 L. J., Ch. 377, S. C.

(*y*) Per Raynsford, C. J., *Cook v. Fountain*, 3 Swanst. 585.

(*z*) Per Raynsford, C. J., *Cook v. Fountain*, 3 Swanst. 585.

(*a*) *The Mayor, &c. of Gloucester v. Wood*, 3 Hare, 131.

(*b*) *Townsend v. Townsend*, 1 B. C. C. 550; 2 Cox, 28; 2 Sch. & Lef. 634; *Gregory v. Gregory*, Cowp. 201; Jac. 631; *Beckford v. Wade*, 17 Ves. 96; *Champion v. Rigby*, 1 Russ. & M. 539; 19 L. J., N. S., Ch. 211; *Portlock v. Gardner*, 1 Hare, 694; *Roberts v. Tunstall*, 4 Hare, 257; 1 Dru. & Wal. 687; *Marquis Clanricarde v. Henning*, 80 Beav. 175.

of the parties existing when the transaction, out of which they arise, occurred.

1. By construction of law independent of intention.

As instances of the former of these two classes of implied trusts, namely, constructive trusts, may be mentioned the renewal of a lease by an executor (*c*), by a trustee, not being an express trustee (*d*); by a guardian (*e*); by a tenant for life (*f*); by the husband of a *cestui que trust* (*g*), especially where she is a lunatic, although a quasi tenant in tail (*h*), who, however, in the absence of disability obtaining a renewal, would take the renewed lease absolutely and without any equity in favour of those claiming after the *quasi* estate tail (*i*); by a mortgagee (*h*); by a joint lessee (*l*); the purchase by an executor of a mortgagee for a term of the reversion (*m*); the purchase of an estate until payment of the purchase-money (*n*); the loan of trust money on mortgage, with notice of the trust, from a trustee (*o*); the receipt of the profits of an infant's estate by a stranger (*p*); in questions of doubt whether any trust exists and whether those in possession are not entitled to the pro-

(*c*) *Holt v. Holt*, 1 Ch. Ca. 190; *Whalley v. Whalley*, 1 Vern. 484; *James v. Dean*, 11 Ves. 382.

(*d*) *Griffin v. Griffin*, 1 Sch. & Lef. 352; *Edwards v. Lewis*, 3 Atk. 538; *Killick v. Flewney*, 4 B. C. C. 161; *Fitzgibbon v. Scanlan*, 1 Dow. 261; *Petre v. Petre*, 1 Drew. 393.

(*e*) *Mason v. Day*, Pre. Ch. 819; *Pierson v. Shore*, 1 Atk. 480; *Milner v. Lord Harewood*, 18 Ves. 275.

(*f*) *Pickering v. Vowles*, 1 B. C. C. 197; *Bowles v. Stewart*, 1 Sch. & Lef. 209; *Eyre v. Dolphin*, 2 Ball & B. 290; *James v. Dean*, 15 Ves. 236; *Randall v. Russell*, 3 Mer. 190; *Giddings v. Giddings*, 3 Russ. 241; *Tanner v. Elworthy*, 4 Beav. 487.

(*g*) *Milner v. Lord Harewood*,

18 Ves. 275.

(*h*) *Fitzroy v. Howard*, 3 Russ. 225.

(*i*) *Blake v. Blake*, 1 Cox, 266.

(*k*) *Rakestraw v. Brewer*, 2 P. W. 511; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Nesbitt v. Tredennick*, 1 Ball & B. 29; *Fitzgerald v. Rainsford*, 1b. 37, n.

(*l*) *Palmer v. Young*, 1 Vern. 276; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

(*m*) *Fosbrooke v. Balguy*, 1 Myl. & K. 226.

(*n*) *Toft v. Stephenson*, 7 Hare, 1.

(*o*) *In re Scott*, 8 Ir. Eq. Rep., N. S. 816.

(*p*) *Lockey v. Lockey*, Pre. Ch. 518; 2 Sch. & Lef. 633. See also *Hicks v. Sallitt*, 3 De Gex, M. & G. 782.

party for their own benefit (*q*), or upon the effect of an instrument either obscure or informal (*r*), or upon an inquiry into facts of ascertained obscurity and difficulty (*s*); in cases of constructive fraud, where the trust is constituted by a decree of a court of equity founded on the fraud (*t*); on the construction of an executory trust as distinguished from a trust executed (*u*). In all these and analogous cases constructive trusts arise, and the relation of trustee and *cestui que trust* is created.

In this class of implied trusts the principles of justice and the interests of mankind require that the utmost regard should be paid to the length of time during which there has been enjoyment, inconsistent with the existence of the trust (*x*). If a person has been in possession, therefore, not as a trustee under some instrument, but under such circumstances that in equity he would be considered constructively a trustee, and yet has continued that possession for more than twenty years, the right of the party who, but for that possession and lapse of time, would be the right owner, is barred (*y*) from the time when he was able to institute a suit in assertion of his claims, with an allowance however, for disabilities (*z*); and although under disability, yet if claiming by virtue of rights derived through persons able to assert, but who abstained from asserting

Effect of length of time in this class.

(*q*) 5 Myl. & C. 17. See also *Att.-Gen. v. St. John's Hospital, Bedford*, 13 W. R. 955.

(*r*) 2 Vern. 299; 2 Jac. & W. 321. See also *Att.-Gen. v. St. John's Hospital, Bedford*, 13 W. R. 955.

(*s*) *Beckford v. Wade*, 17 Ves. 95; *Malone v. O'Connor*, 9 Ir. Eq. Rep., N. S. 459; *Stewart v. Marquis Conyngham*, 1 Ib. 535.

(*t*) 2 Sch. & Lef. 684.

(*u*) See *Senhouse v. Earl*, Amb. 285; *Cordwell v. Mackrill*, Ib. 515; *Warrick v. Warrick*, 3 Atk.

291; 9 Ves. 587, 588; *Bell v. Bell*, Lloyd & G. 44; *Davies v. Davies*, 4 Beav. 54; *Thompson v. Simpson*, 1 Dru. & W. 459; *Stewart v. Marquis Conyngham*, supra.

(*x*) 5 Myl. & C. 17. See also *Att.-Gen. v. St. John's Hospital, Bedford*, 13 W. R. 955.

(*y*) *Petre v. Petre*, 1 Drew. 393.

(*z*) *Beckford v. Wade*, 17 Ves. 92; *Forster v. Hodgson*, 19 Ib. 184.

them, he stands in their place, and the disabilities which affected them affect him (b).

Difficulties will doubtless often arise in determining under what circumstances a constructive trust is created and this relation arises. But these difficulties being overcome, and the relation established, the application of the law under consideration to the case is clear and certain.

These cases of constructive trust are not the subject of any positive law (b), but the maxim *æquitas sequitur legem* is applied to them (c).

2. By construction of law founded on supposed intention.

As instances of the other of the two classes of implied trusts just noticed, namely, those which are or may be founded on some supposed intention of the parties, may be mentioned the case of a trust arising by operation of law, where one person purchases and pays for an estate, and in the conveyance the purchase-money is expressed to be paid by the purchaser, but the estate is conveyed to another person, a stranger to the purchaser (d); and cases where property is conveyed upon trusts, but the trusts expressed do not exhaust the whole of the interest in the property, and the unexhausted interest results to the grantor (e), and, in some instances at least, when the resulting trust does not appear on the face of the instrument containing such partial declaration (f), or where the trust cannot take

(b) 30 Beav. 181.

(c) See *Duke of Leeds v. Earl Amherst*, 2 Phill. 117.

(d) See *Anon.*, 2 Vent. 361; *Gascoigne v. Theving*, 1 Vern. 866; *Lloyd v. Spillett*, 2 Atk. 150; *Smith v. Baker*, 1 Atk. 385; *Murless v. Franklin*, 1 Swanst. 17, 18; *Groves v. Groves*, 3 You. & Jer. 163; *Dyer v. Dyer*, 2 Cox, 92; *Redington v. Redington*, 3 Ridgw. 177; *Lade v. Lade*, 1 Wils. 21; *Lewis v. Lane*, 2 Myl. & K. 449; *Ambrose v. Ambrose*, 1 P. W. 321; *Ex parte Vernon*, 2 Ib. 549; *Rider v. Kidder*, 10

Ves. 360; *Young v. Peachy*, 2 Atk. 256; *Willis v. Willis*, 2 Atk. 71.

(e) *Lloyd v. Spillett*, supra; *Stonehouse v. Evelyn*, 3 P. W. 232; *Langham v. Nenny*, 8 Ves. 467; *Dawson v. Clarke*, 15 Ves. 416; 18 Ib. 247; *Dunnage v. White*, 1 Jac. & W. 583; *Lomas v. Wright*, 2 Myl. & K. 769; *Watson v. Hayes*, 5 Myl. & C. 125; *Ward v. Dyas*, Lloyd & G. 177; *Salter v. Cavanagh*, 1 Dru. & W. 187.

(f) *Salter v. Cavanagh*, supra; on this case vide supra, p. 296.

effect, or the purposes of them cannot be accomplished (*g*); and in cases of marriage articles, where the settlor covenants to settle, but makes no settlement of the property (*h*). In all these and analogous cases implied trusts of the latter of the two kinds just mentioned also arise, and the relation of trustee and *cestui que trust* is also created.

The application of the law of limitation between parties standing in the relation in question in cases of implied trust of the former class is clear. But an important question arises as to whether and how far, as between the parties in this relation under all or any of the cases of implied trust of the latter class, the same application of this law is or should be made. *Primâ facie* it might seem that the application would and ought to be the same. The question, however, is one of considerable difficulty, by no means easily solved, and admits of much discussion (*i*).

The application of the law to this class.

The next special relation we shall notice is that of mortgagor and mortgagee.

Mortgagor and mortgagee.

One is much at a loss, said Patteson, J. (*k*), as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. It is one of a peculiar and anomalous nature and *sui generis*, and is regulated, not by the form of the conveyance, or the legal consequences and effect of it, but by a system of rules established by a long train of decisions, and universally adopted and acted upon in courts of equity (*l*).

The relation described.

The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and cre-

(*g*) *Cruse v. Barley*, 3 P. W. 20; *Stonehouse v. Evelyn*, Ib. 252; *Akroyd v. Smithson*, 1 Bro. C. C. 503; *Robinson v. Taylor*, 2 Ib. 589.

(*h*) See *Bell v. Bell*, Lloyd & G. temp. Plunket, 49; *Thompson v. Simpson*, 1 Dru. & W. 459; 2 Jo. & La T. 110; *Stewart v. Marquis Conyngham*, 1 Ir. Eq. Rep.

N. S. 534.

(*i*) See *Salter v. Cavanagh*, and the observations of Lord St. Leonards on this case, *supra*, p. 296.

(*k*) 5 Adol. & E. 297.

(*l*) 2 Jac. & W. 178, 183, 235; *Trent v. Hunt*, 9 Ex. 14; *Doe d. Roby v. Maiscy*, 8 B. & C. 767; *Pope v. Biggs*, 9 Ib. 245.

ditor, trustee and *cestui que trust*, have been applied to this relation, according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee. "*Quo teneam vultus mutantem Protea nodo?*" (*m*). Sometimes the relation is viewed as the mortgagor or the mortgagee is in or out of the possession of the property mortgaged (*n*). The characters however of mortgagor and mortgagee are as well known, and their rights, powers and interests as well settled, as any in the law (*o*), and the names mortgagor and mortgagee most properly characterize the relation (*p*).

Characters
ascribed to
the mortgagor.

A mortgagor has had ascribed to him a variety of different characters in which there existed some points of resemblance, when it was not very material to ascertain what his powers or interests were, or to settle with any great precision in what respects the resemblance did and in what it did not exist. Thus he has been designated a tenant for years (*q*), tenant at will (*r*), *quodam modo* or *quasi* tenant at will (*s*), tenant at sufferance (*t*); but having a greater resemblance to a tenant at sufferance than to a tenant at will (*u*), to the mortgagee, and as becoming, by a conveyance by the mortgagee, tenant at sufferance to the assignee (*v*). He has also been designated as the servant (*x*), the bailiff or agent (*y*), as resembling a person who has executed

(*m*) Hor. i., Epl. 1, 90; 2 Jac. & W. 182.

(*n*) 4 Mee. & W. 418.

(*o*) Per Buller, J., *Birch v. Wright*, 1 T. R. 383.

(*p*) 2 Jac. & W. 182.

(*q*) *Powsely v. Blackman*, Cro. Jac. 659; 4 Mee. & W. 413; 3 Bing. N. C. 508.

(*r*) *Smartle v. Williams*, Salk. 245; *Keech v. Hall*, Doug. 22; *Leman v. Newnham*, 1 Ves. 52.

(*s*) *Moss v. Gallimore*, Doug. 282; 2 Mer. 359; 2 Jac. & W. 234; 9 Ex. 22; *Doe d. Fisher v.*

Giles, 5 Bing. 421.

(*t*) *Bridgm.* 489; *Thunder v. Belcher*, 3 East, 451; *Partridge v. Bere*, 5 Barn. & Ald. 604; 1 Dow. & R. 272; *Doe d. Roby v. Maisey*, 8 B. & C. 767.

(*u*) Per Littledale, J., 9 B. & C. 253.

(*v*) *Smartle v. Williams*, Salk. 245.

(*x*) 1 H. Bl. 118, n.

(*y*) *Arguendo, Keech v. Hall*, supra; per Parke, J., *Pope v. Biggs*, 9 B. & C. 245.

a statute or recognizance (*z*), as being to some intents and for some purposes a *cestui que trust* (*a*), and as the receiver (*b*) of the mortgagee. But in *Ex parte Wilson* (*c*), Lord Eldon said, admitting the decision of *Moss v. Gallimore*, "I have been often surprised by the statement that a mortgagor was receiving the rents for the mortgagee. . . . A mortgagee never can in this court make the mortgagor account for the rents for the time past. There is not an instance that a mortgagee has *per directum* called upon the mortgagor to account for the rents. The consequence is, that the mortgagor does not receive the rents for the mortgagee. But it would be productive of much error, if it were to be concluded that the resemblance was complete, in every point, to any one of the ascribed characters" (*d*).

The possession by the mortgagor was considered before the 3 & 4 Will. 4, c. 27, as by the permission of, and as respects the Statute of Limitations, not adverse to, the mortgagee (*e*). So also the acts of the mortgagor, assented to by the mortgagee, are considered as the acts of the mortgagee (*f*); and a lessor having mortgaged his reversion, and being permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, is, *presumptione juris*, authorized, if necessary, during such permission to realize by distress, and to distrain for the rent in the name of and as the bailiff of the mortgagee (*g*).

His possession and acts before 3 & 4 Will. 4, c. 27.

Although before the 3 & 4 Will. 4, c. 27, as will be presently seen, the possession of the mortgagee for twenty years, without acknowledgment of the title of the mortgagor, was considered a bar to the latter, even in equity, yet even there, before that statute, the mere

His possession as a bar to the mortgagee.

(*z*) Per Best, C. J., 5 Bing. 427.

(*a*) 4 Bli. 96; 1 Mad. 278, 279, 281.

(*b*) *Moss v. Gallimore*, *supra*.

(*c*) 2 Ves. & B. 252.

(*d*) 2 Jac. & W. 182.

(*e*) *Hall v. Doe d. Surtees*, 5 B. & Ald. 687.

(*f*) Per Tindal, C. J., 7 Bing. 599.

(*g*) *Trent v. Hunt*, 9 Ex. 14.

possession by the mortgagor for the like period without any recognition of the mortgage, or any payment or demand of interest, was considered not a bar to the mortgagee (*h*). But in *Christophers v. Sparke* (*i*), Sir Thomas Plumer, M.R., although declining to decide the point, said, he could not accede to the doctrine that no length of time will operate against a mortgagee who has been out of possession without claim or acknowledgment. . . . With respect to the mortgagor, it is clear that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgment; then why should not this be reciprocal? Why should it be necessary for the relation to be kept alive in the one case and not in the other. The point, in fact, was not decided in either of the cases mentioned; they turned upon particular circumstances. The question indeed did not arise in the case before his honor. The heir of the mortgagor was in receipt of part of the rents, but the land was in the actual possession of a prior mortgagee, under a title commencing in 1788, seven years before the deed under which the plaintiff claimed, and the possession since 1788 had uninterruptedly gone along with the title. The real question in the case was as to the existence of the debt, and, if it existed, whether the circumstances were not sufficient to raise the presumption that it had been satisfied. In *Seager v. Aston* (*k*), Stuart, V.-C., said the principle of *Christophers v. Sparke*—a case of the highest importance, and decided upon the soundest principles—is, that the mortgagee never took actual possession of the mortgaged estate, but allowed possession of that estate, which, as between mortgagor and mortgagee, and by the rules of the court, might become adverse possession, to continue so long that there was

(*h*) See *Leman v. Newnham*,
1 Ves. sen. 51.

(*i*) 2 Jac. & W. 284.
(*k*) 3 Jur., N. S. 481, 483.

by effluxion of time an extinguishment of the right to recover the mortgaged estate. At law, however, subsequently to *Christophers v. Sparke*, such possession by the mortgagor, in the absence of anything to the contrary, was presumed to be with the permission of, and therefore no bar to, the mortgagee (*l*).

The mortgagee has been described to be the holder of the property mortgaged as a security for his mortgage money, and, subject thereto, a trustee for the mortgagor (*m*); not however to all intents and purposes, and subject to the same rules by which a court of equity restrains persons filling a fiduciary character from having any dealings for their own benefit (*n*), but is only to some intents and for some purposes, in some sense and in some sort likened to, a trustee—not that he can with any correctness of speech be called a trustee. In truth, till the debt is paid off he cannot be considered at all as a trustee (*o*); for every person in whom the legal estate is vested, with a beneficial interest for another person, in a sense, is a trustee for that person (*p*). On a demand and tender of the principal and interest he is a trustee to convey the estate to the mortgagor (*q*). But it is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purposes of it, and after that is fully satisfied, its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He

Position and character of a mortgagee.

(*l*) *Hall v. Doe d. Surtees*, 5 B. & Ald. 687.

(*m*) Jickling's Analogy, 70; 1 Mad. 278; 2 Ball & B. 575.

(*n*) 8 Hare, 221.

(*o*) 1 Myl. & K. 287.

(*p*) 4 Bli. 96; 8 Hare, 220.

(*q*) *Ib.* 97.

acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and *cestui que trust*. They have always an identity and unity of interest, and are never opposed in contest to each other. In general a trustee is not allowed to deprive his *cestui que trust* of the possession, but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast is strongly marked. The interference is refused because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and *cestui que trust*. The ground on which a mortgagee is, in any case, and for any purpose, considered to have a character resembling that of a trustee, is the partial and limited right which, in equity, he is allowed to have in the whole estate legal and equitable. He does not at any time possess, like a trustee, a title to the legal estate, distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either he is fully entitled to both, and to the legal and equitable remedies incident to both; but in equity his title is confined to a particular purpose. When the money due to him is paid, his duty is to reconvey the estate to the person entitled to it; it never remains in his hands clothed with any fiduciary duty. When paid off, the mortgage title ends, and then, and not before, the implied trust, to surrender the estate to the person entitled to demand it, begins (*r*). All the cases treat the mortgagee, as soon as he is paid, as becoming a mere naked trustee, holding the legal estate for the benefit of the *cestui que trust*, the mortgagor (*s*). And yet there

(*r*) 2 Jac. & W. 183, 184.

(*s*) 1 Mad. 278, 279, 281; 1 Myl. & K. 287.

is a great difference, and nothing proves it better than this, that though he is a trustee for twenty years, yet, if he takes but a little bit more, the case becomes altered, and after that time, without any acknowledgment, or any account, he is no longer a trustee (*t*).

A mortgagee in possession has been described as a bailiff without a salary, accountable to, but not paid by, the mortgagor (*u*) and *quasi* owner (*x*). When he takes possession he is not acting as a trustee for the mortgagor, but independently and adversely for his own benefit (*y*). When in possession.

There is, however, this material difference between adverse possession at law and the possession of the mortgagee; the former is inconsistent with the title of the true owner, the latter is consistent with the equitable title of the mortgagor. The former for twenty years gives absolute title at law, but the latter for the like period does not, in itself, give title against the mortgagor (*z*). Difference between his possession and adverse possession.

A mortgagee may be, either before default, tenant in mortgage, or after default and before possession, in which state he is a mere creditor, having a lien upon the estate, and being entitled to take possession; or he may be, after possession and before payment of his debt, in which state he is a *quasi* owner, and is holding the estate for his own purpose of working out his own satisfaction; or he may be in, after payment of the debt, and then he is a mere trustee (*a*). His position before and after possession.

The mortgagee, assenting to the acts of the mortgagor, adopts those acts (*b*), and, permitting the mortgagor to continue in the receipt of the rent, authorizes Assenting to the acts of the mortgagor.

(*t*) Per Lord Eldon, C., *Dillon v. Parker*, Jac. 518. (*y*) 2 Jac. & W. 184; 7 Bing. 599.

(*u*) *Davis v. Dendy*, 3 Mad. 170; *Quarrell v. Beckford*, 1 Mad. 269. (*z*) 1 Mad. & G. 184. (*a*) Per Lord Brougham, 1 Myl. & K. 287.

(*x*) 1 Myl. & K. 287. (*b*) 7 Bing. 599.

him, *præsumptione juris*, to realize, if necessary, the rent by distress in the name and as the bailiff of the mortgagee (*c*).

Effect of his possession before 3 & 4 Will. 4, c. 27.

If before 3 & 4 Will. 4, c. 27, the mortgagee was in possession of the whole, and not a part only (*d*), of the estate in mortgage for twenty years without claim by the mortgagor, who was free from disability (*e*), the mortgagor was barred (*f*). But even during such possession, if the mortgagee in a letter to a friend (*g*), such letter proving itself (*h*), in a settlement between third persons (*i*), in a surrender to which neither the mortgagor nor his heirs were parties (*k*), in an assignment (*l*), in an answer in Chancery (*m*), by a recital in a deed (*n*) or in his will (*o*), treated or alluded to the mortgage as subsisting, or kept an account (*p*), or demanded the principal money, or received the interest (*q*), such a possession was no bar, and the title of the mortgagor remained for twenty years, computed from any such act of the mortgagee.

Acts admitting title of mortgagor.

The relation altered by that act.

Mortgagor in possession.

The chapter 27 has introduced, in this relation, important alterations. Now, if the mortgagor be in possession for twenty years and upwards, whether the mortgage be legal or equitable (*r*), without payment of principal or interest, and without acknowledgment in writing of the title of the mortgagee, in the mode expressed in the section 14, the mortgagee is barred at

(*c*) *Trent v. Hunt*, 9 Ex. 14.

(*d*) *Burke v. Lynch*, 2 Ball & B. 426; *Blake v. Foster*, 1b. 505.

(*e*) *Blewett v. Thomas*, 2 Ves. jun. 609; *St. John v. Turner*, 2 Vern. 418; *Trash v. White*, 3 B. C. C. 289; *Whiting v. White*, 2 Cox, 290.

(*f*) 2 Jac. & W. 187.

(*g*) *Fenwick v. Read*, 6 Madd. 8.

(*h*) *Ib.*

(*i*) 2 Cox C. C. 294.

(*k*) *Hansard v. Hardy*, 18 Ves. 450.

(*l*) *Smart v. Hunt*, 4 Mad. 478, n. (*a*).

(*m*) *Procter v. Oates*, 2 Atk. 140.

(*n*) *Carew v. Johnstone*, 2 Sch. & L. 295.

(*o*) *Anon.*, 3 Atk. 314.

(*p*) *Vernon v. Bethell*, 2 Eden, 114; *Anon.*, 2 Atk. 533.

(*q*) *Hatcher v. Fineaux*, 1 Lord Raym. 740; *Trash v. White*, *supra*.

(*r*) 2 Con. & L. 148.

law (*s*) and in equity (*t*). The equity of redemption is land in equity, and a foreclosure suit is to recover land in equity, as well as an ejectment is to recover it at law (*u*); and the 1 Vict. c. 28, is a legislative declaration that it is (*x*), and treats legal and equitable rights as co-extensive, and both kinds are within the section 24 of chapter 27, and this later act (*y*). The mortgagee, however, may not be barred of the land at law, and yet may be unable to recover the mortgage money in equity (*z*).

But if the mortgagee does not come as, or in the character of, plaintiff, to enforce his right, which are the only cases provided for by the statute, chapter 27, but merely as a defendant in a suit instituted prior to the passing of that statute, by a *puisné* creditor for the purpose of raising his demand, the statute is inapplicable (*a*).

When mortgagee not affected by the act,

So, if a mortgagor, without the mortgagee, convey part of the mortgaged property to a purchaser, and the mortgagee continues to receive interest on the mortgage, no title is gained by the purchaser against the mortgagee (*b*).

—or by act of the mortgagor.

On the other hand, if the mortgagee, whether legal or equitable (*c*), continue in possession for a like period of twenty years without giving to the mortgagor any acknowledgment according to the section 14 or the

Effect of possession of mortgagee.

(*s*) Sect. 2; 1 Vict. c. 28; *Doe d. Jones v. Williams*, 5 Ad. & E. 291; *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 558; *Doe d. Palmer v. Eyre*, 17 Q. B. 866; *Re Muskerrey*, 9 Ir. Eq. Rep., N. S. 94; *Forsyth v. Burton*, 8 Ex. 716; *Doe d. Badoley v. Massey*, 15 Jur. 1038.

(*t*) See *Dearman v. Wych*, 9 Sim. 570; 8 Ir. Eq. Rep., N. S. 322; *Wrixon v. Vize*, 2 Con. & L. 138; *Gregon v. Hindley*, 10 Jur. 388.

(*u*) 2 Con. & L. 149; 2 Hare, 334.

(*x*) 8 Ir. Eq. Rep., N. S. 322.

(*y*) See *Wrixon v. Vize*, 2 Con. & L. 138.

(*z*) 2 Con. & L. 149.

(*a*) *Murphy v. Sterne*, 1 Dru. & Wal. 236.

(*b*) *Doe d. Palmer v. Eyre*, 17 Q. B. 866; *Re Muskerrey*, 9 Ir. Eq. Rep., N. S. 94; *Chinnery v. Evans*, 11 H. L. C. 115.

(*c*) 2 Con. & L. 138.

section 28 (*d*), the mortgagor is barred, both at law (*e*), and in equity (*f*).

After becoming owner of the equity of redemption.

If, however, both characters be united in the mortgagee, as if he become either the purchaser of the life interest of a tenant for life (*g*), or the devisee for life, or a tenant in common with others (*h*), of the equity of redemption, the relation, so long as that union exists, is not affected.

His possession, before and since the act, of part of the property.

Where before the 3 & 4 Will. 4, c. 27, a mortgagee obtained, and for twenty years and upwards continued, the possession of only *part* of the land or rent in his mortgage, and the mortgagor retained the possession of the remainder, paying the interest on the mortgage, such possession of the mortgagee did not (*i*), and it is apprehended will not now, exclude the mortgagor from redeeming such part of the lands in the possession of the mortgagee. For the mortgagee, and not the mortgagor, has the legal title to that part in the possession of the latter, and that possession is under, and keeps open, the mortgage title, and the mortgagor cannot get back the legal title except by filing a bill to redeem, and then there would be a decree for redemption as to one part and not as to the other; which, where the plaintiff succeeds by force of his own title and not on any submission by the defendant, seems very inconsistent, and would be directly contrary to the opinion of Lord King in *Rakestraw v. Brewer*, Sel. Ca. Ch. 55 (*k*); and neither the policy and the principle of the 3 & 4

(*d*) See *Trulock v. Roby*, 12 Sim. 402; *Lucas v. Dennison*, 13 Ib. 584; *Stanfield v. Hobson*, 16 Beav. 237.

(*e*) Sect. 2.

(*f*) Sects. 24, 28; *Browne v. Bishop of Cork*, 1 Dru. & War. 700; *Batchelor v. Middleton*, 6 Hare, 75.

(*g*) *Corbett v. Barker*, 1 Anstr. 88; 3 Ib. 755; *Reeve v. Hicks*, 2

Sim. & S. 403; *Ravald v. Russell*, 1 You. 9; *Raffety v. King*, 1 Keen, 604; *Hyde v. Dallaway*, 2 Hare, 603. But see *Browne v. Bishop of Cork*, *supra*.

(*h*) *Wynne v. Styan*, 2 Phill. 303.

(*i*) *Burke v. Lynch*, 2 Ball & B. 426; *Blake v. Foster*, Ib. 505.

(*k*) *Burke v. Lynch*, *supra*.

Will. 4, c. 27, nor even the terms of the section 28 of it, are opposed to this view of such case.

So in the case last mentioned the possession by the mortgagor of the remainder of the lands, or by a purchaser for value from him, the interest being satisfied from those in the possession of the mortgagee, will not exclude the title of the mortgagee to the remainder (*l*). When possession of part by mortgagor does not,

But the possession of part of the land or the rent by the mortgagee without payment of either rent or the debt, or of interest on it within twenty years, does not preserve his title to the other part (*m*). —and does, exclude title of mortgagee to rest.

In the case of a mortgage of an advowson in gross, however, the relation would be preserved for a much longer period. For the section 28 of 3 & 4 Will. 4, c. 27, applies where the mortgage is of land or of rent only. Advowsons are the subject of separate provisions (*n*); and notwithstanding the extreme limit fixed by the section 33, the relation, where the mortgagor is a coparcener, would be preserved for a still longer period. For usurpation by one coparcener (*o*), or by a stranger (*p*), upon another coparcener, does not, and will not now, put the other coparcener out of possession, and, as formerly, so now the possession in such a case by one coparcener is the possession of the other. The section 13 of the 3 & 4 Will. 4, c. 27, extends to land and to rent only. In mortgages of advowsons in gross,

So where the mortgage is of lands and also of an advowson in gross, the relation, by reason of the advowson, may be still further preserved as to the lands than even in the case of a mortgage of lands only, and where only part of the lands have been in the possession of the mortgagee, and for the like reasons as in the latter case (*q*). —with lands.

(*l*) *Chinnery v. Evans*, 11 H. L. C. 115.

(*m*) *Thorpe v. Facey*, 13 Jur., N. S. 741; 1 Har. & R. 678, *S. C.*

(*n*) Sects. 31, 32, 33.

(*o*) 13 Edw. 1, c. 5.

(*p*) 2 Inst. 365; *Barker v. Lomax*, Willes, 659; 1 H. Bl. 412.

(*q*) *Vide supra*.

Landlord and tenant.

The last special relation we notice is that of landlord and tenant.

Acts of the tenant.

A termor has a duty to preserve the interest of his landlord, and many acts, therefore, may be done by a person claiming in the character of a termor for years, which, if done by persons standing in other relations, would be acts to be denominated acts of adverse possession; but the law, when it imposes upon a man the duty to abstain from doing those acts, will not permit him to say they are acts of adverse possession, having the effect of acts of adverse possession (*r*).

Cannot dispute landlord's title.

It is a rule which has been established for centuries that a tenant is not permitted to dispute his landlord's title to confer possession at the time of the demise, although he may certainly show that the title determined afterwards (*s*).

If, however, a person seised in fee were induced, by fraud, to take, or take by mistake, a lease of the property, a court of equity might control the setting up that lease: in a case of fraud it certainly might, in a case of mere ignorance there might be great difficulty in holding that a court of equity could interfere (*t*).

Tenant's possession that of landlord.

The possession of the tenant during the term is the possession of the landlord, and the former cannot be allowed to deal with the possession so as to deprive the latter of his right. If this distinction were not exactly observed, property would be thrown into confusion, especially in cases of long terms, where no rent is reserved to keep up the memory of the tenure (*u*). The tenant's possession, even when abusing his right or exercising it to an extent not authorized by his tenure, is still the landlord's possession, and the abuse can never give the tenant a right against his landlord (*x*).

(*r*) 4 Bl. 96. See also *Att.-Gen. v. Fullerton*, 2 Ves. & B. 263.

(*s*) Per Best, C. J., *Alchorno v. Gomme*, 2 Bing. 54; *Downs v.*

Cooper, 1 G. & D. 573.

(*t*) 2 Sch. & Lef. 101.

(*u*) *Ib.* 98.

(*x*) *Lord Courtown v. Ward*, 1 Sch. & Lef. 8; 2 G. & D. 189.

But if the tenant, with the knowledge of his landlord, betray the possession to a third person, who does not claim the estate of the tenant, and the landlord make no attempt to recover the possession, the relation of landlord and tenant between the landlord and such third person will not be created (*y*); for the landlord having notice of, and submitting to, an adverse title, and taking no steps to oppose it, has no right afterwards to affect the title of a third person (*z*).

Tenant betraying possession to a stranger.

The landlord has no right of entry pending the lease, and he is not bound until the expiration of the term to take advantage of any forfeiture of the lease and re-enter for a condition broken (*a*). And if the tenant levied a fine, the landlord, on the expiration of the term, might bring ejectment without making any entry to avoid the fine (*b*).

Right of landlord during lease.

In this relation, however, as we have already noticed, alterations of great importance, which in effect, in certain cases, determine the relation, have been introduced by the 3 & 4 Will. 4, c. 27 (*c*).

Alterations in this relation.

Where a lease is granted by a charitable corporation (*d*), or by the trustees of lands for a charity (*e*), of parts of the charity property, the attorney-general, in a suit by him on behalf of the charities to set aside the leases, cannot set up this relation in answer to a plea of the statute 3 & 4 Will. 4, c. 27, in bar of such a suit.

For whom the relation not available.

(*y*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 625; 2 Ball & B. 273.

(*z*) 2 Ball & B. 278.

(*a*) *Doe d. Cook v. Danvers*, 7 East, 819; 3 & 4 Will. 4, c. 27, s. 4; 9 H. L. C. 381.

(*b*) 1 East, 575.

(*c*) Vide ante, pp. 106, 107.

(*d*) *Att.-Gen. v. Payne*, 27 Beav. 168.

(*e*) *Att.-Gen. v. Davey*, 4 De Gex, J. & F. 136.

SECTION IV.

Persons not affected by these Laws.

Certain corporations as to
—tithes, &c.,
as an inheritance,

Corporations sole, both spiritual and eleemosynary, as respects tithes, moduses and compositions as an inheritance, and distinguished from them as chattels, are still, as formerly (*f*), exempt from the operation of the Statutes of Limitation. For the 2 & 3 Will. 4, c. 100, extends to such corporations as respects only claims of exemption or discharge from the payment or render of tithes, moduses or compositions as chattels, and not as respects claims to an estate in them, as between adverse claimants (*g*); and such corporations, when the tithes, moduses or compositions belong to them as an inheritance, are exempted from the 3 & 4 Will. 4, c. 27 (*h*), and are still within the old maxim, *nullum tempus occurrit ecclesiæ* (*i*); and notwithstanding the commutation of the tithes, those corporations are, in relation to the rent charge for such commutation, in the same position as before the commutation they were in, in relation to the tithes themselves (*k*).

—light, 2 & 3
Will. 4, c. 71.

A parson or vicar, for the benefit of the church and his successor, is, in some cases, esteemed in law to have a fee simple qualified; but to do anything to the prejudice of his successor in many cases the law adjudgeth him to have in effect but an estate for life (*l*), and generally the successor is not bound by the laches or negligence of the predecessor (*m*). Therefore corporations sole, either spiritual or eleemosynary, and who are not seised in fee, although as respects each individual

(*f*) *Quilter v. Mussendine*,
Gilb. Rep. 228.

(*g*) *Dean and Chapter of Ely v. Cash*, 15 Mee. & W. 617, S. C.;
sub nom. *Dean and Chapter of Ely v. Bliss*, 2 De Gex, M. & G. 259.

(*k*) See that stat. sect. 1.

(*i*) 2 De Gex, M. & G. 471.

(*h*) 6 & 7 Will. 4, c. 71, s. 71.

See *Clarke v. Yonge*, 5 Beav. 523.

(*l*) Co. Litt. 341 a.

(*m*) Plowd. 375, 538; 11 Co. 71 a.

they may be within the 2 & 3 Will. 4, c. 71, s. 3, yet, as respects their successors, they are not, it is apprehended, affected by that provision of the statute. For in the sect. 7, excluding from computation of the period fixed by such provision, the period during which any person is tenant for life, the term person alone is used, and generally that term does not embrace such corporations (*n*), and being expressly mentioned in the sections 1 and 2, and not being mentioned in the section 3, are not within the latter section. *Expressio unius exclusio alterius* (*o*), and the assignee of such a corporation under the powers of the 55 Geo. 3, c. 147, would not be affected by such provision, for he would be entitled to all the rights belonging to the land of such corporation at the time of the acquisition thereof by him (*p*).

(*n*) Vide ante, p. 261.

4 B. & Ald. 579.

(*o*) See *Barker v. Richardson*,

(*p*) *Ib.*

CHAPTER III.

THINGS TO WHICH THESE LAWS ARE, AND THINGS TO WHICH THEY ARE NOT, APPLICABLE.



SECTION I.

Things belonging to the Crown and to the Duke of Cornwall.

Possessions of the Crown. ALL lands and tenements which the sovereign has belong to him *jure coronæ*, and are called *sacra patri-monia*, or *dominica coronæ* (a); and all the lands and possessions whereof the sovereign is seised *in jure coronæ* shall, *secundum jus coronæ*, attend upon and follow the Crown, and therefore to whomsoever the Crown descends, those lands and possessions descend also, for the Crown and the lands whereof the sovereign is seised *in jure coronæ* are *concomitantia* (b).

What they include. These possessions include all those acquired by the sovereign in his private capacity, before (c) or after (d) the descent of the Crown to him, either by purchase or by descent, as the duchy of Lancaster (e), or given to, or vested in him, his heirs and successors, by statute, without saying as parcel of his Crown, or to such effect; for the word successors declares that the lands are annexed to the Crown, and shall go in succession, and that he shall have them as sovereign (f).

Duchy of Lancaster.

(a) Co. Litt. 1 b.

(b) Co. Litt. 15 b; Plowd. 213, 244, 245, 246, 247.

(c) Skin. 603; Plowd. 213.

(d) Co. Litt. 16 a; Alcock & Nap. Ir. Rep. 548.

(e) Plowd. 214, 238.

(f) Plowd. 106; supra, p. 240.

The possessions of the duchy of *Cornwall*, when vested in the sovereign by reason of there being no Duke of Cornwall *in esse*, are also vested in the sovereign *jure coronæ*, and within the same laws and prerogatives as the other possessions of the sovereign (*g*).

Duchy of
Cornwall.

The legislature has from time to time restrained the sovereign from alienating, beyond a certain extent, the possessions of the Crown (*h*), and has also enabled the sovereign to dispose of absolutely certain lands acquired by purchase and otherwise. But such lands not so disposed of, or any only partially disposed of, go and descend as if the statutes authorizing such disposition had not been made (*i*).

Alienation re-
strained.

The possessions of the Crown embraced by the statute applied to those in *England* (*k*), and by that applied to those in *Ireland* (*l*) are manors, lands, tenements, rents, tithes and hereditaments, excluding, in both statutes, liberties or franchises. The terms manors, tenements and hereditaments are of a very comprehensive character (*m*); and the term land, although less, is still very comprehensive (*n*).

What within
Statutes of
Limitation for
the Crown.

The term land, being *nomen generalissimum*, includes mines (*o*); and mines, whether opened or unopened, and whilst unsevered from the land, are part of it (*p*), and when severed in title and possession from the title and the possession of the land of which they form part are a distinct and separate corporeal hereditament (*q*), and the right of the owner of them is

Mines severed
or unsevered
from the land.

(*g*) Vide ante, Chap. II. of this Book, Sect. I.

(*h*) See the several statutes recited in 39 & 40 Geo. 3, c. 88.

(*i*) 39 & 40 Geo. 3, c. 88; 4 Geo. 4, c. 18; 25 & 26 Vict. c. 37; ante, p. 241.

(*k*) 9 Geo. 3, c. 16.

(*l*) 48 Geo. 3, c. 47.

(*m*) See Co. Litt. 5 a, 58 a, 6 a; Perk. s. 116; Plowd. 168; Touch. 90.

(*n*) Co. Litt. 4 a; Touch. 92.

(*o*) Co. Litt. 4 a; Touch. 90;

Rowbotham v. Wilson, 8 H. L. C. 348.

(*p*) 5 Co. 12; 12 Ib. 9, 12; Plowd. 330; Touch. 77, 78; *Earl of Cardigan v. Armitage*, 2 B. & C. 197; *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Wilkinson v. Proud*, 11 Mee. & W. 33; *Rogers v. Brenton*, 10 Q. B. 26, 49.

(*q*) *Ib.*; Touch. 96; *Townley v. Gibson*, 2 T. R. 701; *Rowe v. Grenfel*, Ry. & Moo. 396.

Right to, not
excluded by
non-user.

consistent with the enjoyment of the soil by the owner of it (*r*); and as they are frequently purchased or accepted with a view to their being opened and worked at a future time, and very seldom with an intention of immediate use, they are exempted from the presumption which nonuser justifies in other kinds of property. The mere omission to work them is quite compatible with the intention to preserve and to exercise the right to them (*s*). The right of the Crown therefore to this description of property may, notwithstanding the lapse of sixty years, or even of a much longer period, remain unaffected (*t*).

In one case indeed (*u*), where there was a reservation in a grant of land by the Crown of all mines of tin, lead, and all royal mines, Lord Hardwicke, on the mere probability of there being no mines under the land, compelled a purchaser of the land to take it notwithstanding such reservation, and without any compensation. But this case, as regards all mines, other than royal mines, has not only not been recognized but has been disregarded in subsequent instances of mines accepted in grants of land by a subject (*x*).

Within those
statutes.

Mines, therefore, when unsevered in fact, and also in title and in possession, are included in the statutes applied to the possessions of the Crown here noticed under the term land used therein; and when unsevered in fact, but severed in title and in possession, are included either in that term, or in the term hereditament also used therein. And that they are so included may be inferred from the exception of mines in the statutes presently to be noticed, applied to the possessions of the duchy of Cornwall; for these latter statutes, exclusive

(*r*) 16 Ves. 392.

(*s*) *Adair v. Shaftoe*, 19 Ves. 156; *Seaman v. Vardrey*, 16 Ib. 390; *M'Donnelly v. M'Kinty*, *supra*; *Smith v. Lloyd*, *supra*.

(*t*) *Ib.*

(*u*) *Lyddall v. Weston*, 2 Atk. 19.

(*x*) See *Adair v. Shaftoe*, *Seaman v. Vardrey*, *M'Donnell v. M'Kinty*, *Smith v. Lloyd*, *supra*.

of such exception, are in the same terms as the former ones applied to the possessions of the Crown.

Mines royal, however, belong to the Crown by virtue of the royal prerogative (*y*), and are affected by somewhat different considerations to those of other kinds of mines. Mines royal.

Mines royal will not pass under the term land, or even under the term mines, in a grant of land by the Crown, but must be granted in express terms (*z*). When not included under term land.

Where, said Lord Hardwicke (*a*), the Crown has only a bare reservation of royal mines, without any right of entry, it cannot grant a licence to any person to come upon another man's estate, dig up his soil and search for mines. This position, said Sir W. Grant, M. R. (*b*), is liable to considerable doubt; as being inconsistent with the resolutions of the judges in the case of mines in Plowden (*c*). His lordship also added, there is no such power in the Crown, and it has none such power by the royal prerogative of mines; for it would be very prejudicial if the Crown could enter into a subject's lands, or grant a licence to work the mines; but when they are once opened it can restrain the owner of the soil from working them, and the Crown can either work them or grant a licence for others to work them.

The reservation in the case before Lord Hardwicke, was of mines of tin, lead, and all royal mines. But as mines royal will pass by express words only, as just stated, the reservation in the grant in that case was surplusage. The proposition of his lordship, questioned by Sir W. Grant, is expressly in relation to such mines, and the context shows that the proposition applied to only mines royal unopened, and, when the case in

(*y*) *Reg. v. The Earl of Northumberland*, Plowd. 810; 10 Q. B. 26. See 1 W. & M. c. 80, s. 4; 5 Ib. c. 6.

(*z*) Ib.; Hob. 244.

(*a*) *Lyddall v. Weston*, 2 Atk. 19.

(*b*) 16 Ves. 893.

(*c*) Plowd. 810. See p. 386.

Plowden and the resolutions of the judges therein are considered, is not inconsistent with that case, for the mines involved in it were open, and it is applicable to only such mines.

Although, however, the grant of land, or even of land and mines, by the Crown will not, under either term, without express words, pass mines royal (*d*) under such land, yet by such a grant of land or of such land and mines generally, excepting mines royal, the title to and the possession of the latter mines are severed from the title to and the possession of the land; and, although unopened for a long period, the right of the Crown to such mines, notwithstanding the lapse of sixty years, or even of a much longer period, may be unaffected (*e*).

Crown mines
affected so far
only as
worked.

Mines, however, belonging to the Crown are only affected by the statutes applied to its possessions so far as such mines may have been actually worked; for only in favour of right and in support of the agreement of parties, and not in subversion of such right or agreement, is the possession of part of mines deemed the possession of the whole (*f*).

Rents.

Rents in the section 1, as compared with those in the section 7, of the 9 Geo. 3, c. 16, and also rents in the section 1, as compared with those in the section 5 of the 48 Geo. 3, c. 47, mean rent services, or such rents as are rendered in lieu of, and as an equivalent for, issues and profits, with which, as being *ejusdem generis*, they are associated, and not quit rents (*g*).

Advowsons.

Advowsons are the subject of express provisions in the 3 & 4 Will. 4, c. 27. But that statute does not name, and therefore does not affect the Crown (*h*); and

(*d*) *Reg. v. The Earl of Northumberland*, Plowd. 310.

(*e*) See *Touch*, 77, 78; *Adair v. Shaftes*, 16 Ves. 390; *Seaman v. Vandrey*, 19 Ib. 156; *Earl of Cardigan v. Armitage*, 1 B. & C. 197; *McDonnell v. McKinty*, 10

Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Ronce v. Grenfel*, Ry. & Moo. 396.

(*f*) Vide ante, pp. 78, 79.

(*g*) See *Tutkhill v. Rogers*, 1 Jo. & Lat. 86.

(*h*) Vide ante, p. 248 *et seq.*

the statutes applied to the possessions of the Crown in England and Ireland just mentioned do not comprise in specific terms advowsons; and, as in the construction of statutes, nothing is ever to be taken by equity against the Crown (*i*), the question is, whether this species of property is embraced by the general terms employed in the statutes applied to those possessions.

In modern times, and in ordinary language, said Sir J. Romilly, M. R. (*k*), an advowson is restricted in its meaning to the perpetual right of presentation to a church, or to an ecclesiastical benefice. The term advowson, however, has in law also a similar restricted signification, indicating that particular species of advowson called advowson of a church. Advowson, *advocatio*, says Lord Coke (*l*), so called because the right of presenting to the church was first gained by such as were founders, benefactors or maintainers of the church, and therefore called *advocati*. They were also called *patroni*, and the advowson was called *jus patronatûs*. The term advowson however has, in law, a much more extensive signification. "Advowson, *advocatio*," says Lord Coke (*m*), "signifying an advowing or taking into protection, is as much as *jus patronatûs*." In this signification is included the right of nomination to the mastership of an hospital, a right which, although not to present to a church or an ecclesiastical benefice, in every respect, other than that of having the cure of souls attached to the office, exactly resembles, if it be not identical with, an ecclesiastical benefice (*n*).

Meaning of
advowson.

At common law, before the statute *De Prærogativa Regis* (*o*), a grant by the Crown of a manor to which an advowson was appendant, without the words *cum pertinentibus*, would pass the advowson (*p*). But that

When and
when not
passing by
grant of a
manor.

(*i*) Flowl. 244.

(*k*) 17 Beav. 383.

(*l*) 1 Inst. 119 b.

(*m*) 1 Inst. 17 b.

(*n*) *Att.-Gen. v. Evelme Hospital*, 17 Beav. 366.

(*o*) 17 Edw. 2, st. 2, c. 15.

(*p*) See *Whistler's case*, 10 Co. 63.

statute declared that when the king gives or grants any manor or land with the appurtenances, knights' fees, advowsons of churches, and endowments of women, pertaining to such manor or land, unless expressed, are reserved to the king. Therefore since this statute, a grant by the Crown of a manor or land to which an advowson is appendant, and *à fortiori* where only in gross, will not pass by general words, but must be expressly named (*q*).

Statute *De Prærogativa Regis*.

The statute *De Prærogativa Regis* enumerates most of the prerogatives of the Crown, is rather a collection of old prerogatives than a new statute (*r*), is, in some respects at least, declaratory of the common law (*s*), in some points a statute, and in some not (*t*), and is confined to the three subjects, knights' fees, advowsons of churches, and endowments of women, and where they are the subjects of gift or grant only (*u*); and does not extend to advowsons of any other kind, as of an hospital (*x*). Where therefore such an advowson as this last is appendant to a manor, a grant of the manor by the sovereign, and of all advantages as full and complete as he holds them, will comprise the advowson, but only if appendant (*y*).

When advowsons comprehended in general terms of a statute.

It does not, however, follow that, because advowsons will not pass by a *grant* from the Crown unless expressly mentioned, they may not be comprehended under general terms in an act of parliament, sufficient in themselves, independent of the owner of such property, to embrace advowsons, whether appendant or in gross. The terms used in these statutes, and by which, if at all, advowsons are comprehended, are manors, tenements and hereditaments. In ordinary cases, as between subject

(*q*) See *Whistler's case*, 10 Co. 63; 1 Inst. 77 a; Plowd. 251; 5 Co. 11; *Rea v. The Bishop of Durham*, Com. Rep. 361; *Att.-Gen. v. Sitwell*, 1 You. & Coll. 559; 17 Beav. 386.

(*r*) Show. P. C. 176.

(*s*) Plowd. 243.

(*t*) Ib. 176, arg.

(*u*) See *Whistler's case*, 10 Co. 63.

(*x*) *Att.-Gen. v. Exchequer Hospital*, 17 Beav. 366.

(*y*) Ib.

and subject, any of these terms would comprise an advowson appendant, and the two latter an advowson in gross also (*z*).

In *Gibson v. Clark* (*a*), it was argued on one side that the right of the Crown was barred in only those cases where the subject of the claim has not been put in charge within sixty years, and that an advowson could not be put in charge; and on the other side that advowsons must be included under the term hereditaments, and as was shown by another section (*b*), which expressly excepted certain advowsons. The issue there, however, was between subject and subject, and a decision of the question was not necessary, and those parts of the statute relating to possessions being in charge might mean only those which could be so, and did not necessarily exclude those which could not. When however we consider that these statutes have reference to the Crown and its possessions exclusively, that the object of them was expressly for securing the general quiet of the subject against all pretences of concealment whatsoever (*c*), and for limiting the time within which the Crown might sue, and to secure to the subject the free and quiet enjoyment of those possessions which he had held for sixty years (*d*), and the comprehensive character of the terms employed in these statutes (*e*), the conclusion is that advowsons, when appendant, are, under the word manors, within these statutes, and that advowsons in gross also would seem to be equally embraced by the statutes, either under the term tenement or the more comprehensive term hereditament (*f*). The former of these two terms is alone used in the statute *de donis* (*g*), and is very comprehensive (*h*); and that statute was in

(*z*) 1 Inst. 77 a, 121 a; *Holmes' case*, 3 Bing. 176.

(*a*) 1 Jac. & W. 159.

(*b*) Sect. 9, 9 Geo. 3, c. 16.

(*c*) 9 Geo. 3, c. 16.

(*d*) 48 Geo. 3, c. 47.

(*e*) Vide supra, p. 317.

(*f*) Co. Litt. 6 a; 4 Bing. 295, 6, 7.

(*g*) West. 2, 18 Edw. 1, c. 1.

(*h*) Co. Litt. 19 a.

restoration of the common law and binds the Crown and is in the nature of a restitution, and in restitutions the Crown has no favour, nor has its prerogative any exemption, but the party restored has favour (*i*).

Next presentation.

Although the Crown may be barred of an advowson itself, yet if, being the grantee of a next presentation, on the next avoidance a stranger presents, six months elapse, and the clerk dies, the Crown may present when it pleases, *quia nullum tempus occurrit regi*, and therefore may take the presentment when he thinks proper (*j*). This seems to be still the law in such a case.

Rights acquired against a subject.

The Crown may acquire, by prescription and usage, a title or interest in the freehold of the subject (*k*), and it is conceived that rights or titles so acquired are also within the general words of the two statutes relating to the possessions of the Crown just noticed.

Chattels real.

The subjects embraced by these statutes are manors, lands, tenements, tithes, rents, and hereditaments. Whether chattels real are within these terms may be a question. A manor consists of a seignory and lands, called the demesnes, and these are freeholds (*l*), and comprises nothing which is not parcel of it (*m*). Manors therefore, and also tithes and rents, are inapplicable to such chattels, and thus the only terms applicable to them are lands, tenements and hereditaments. Now a grant (*n*), or a devise (*o*) before the late Wills Act (*p*), in the absence of anything showing a contrary intention (*q*), where the grantor or devisor has also freehold, will not comprise such chattels. In *Saunders v. Stevens* (*r*),

(*i*) *Willion v. Berkley*, Plowd. 223.

(*j*) Plowd. 243.

(*k*) Plowd. 322.

(*l*) 1 Cru. Dig. c. 3, ss. 4, 5.

(*m*) Plowd. 168, 170; Touch. 92.

(*n*) Touch. 88, 91, 92.

(*o*) *Rose v. Bartlett*, Cro. Car.

293; *Wilson v. Eden*, 5 Ex. 752; 18 Q. B. 474.

(*p*) 1 Vict. c. 28.

(*q*) *Doe d. Davies v. Williams*, 1 H. Bl. 25; *Hartley v. Hurie*, 5 Ves. 540; *Lane v. Stanhope*, 6 T. R. 345; *Hobson v. Blackburn*, 1 Myl. & K. 521; *Goodman v. Edwards*, 2 Ib. 759.

(*r*) 1 Com. 270.

which was a *qui tam* action against the defendant for acting as a commissioner of land tax without a sufficient qualification, not being seised of "lands, tenements or hereditaments," the plaintiff contended that these terms, taken with the term seised, applied to freeholds only, but the court held that a chattel real of the requisite annual value was a sufficient qualification. Considering however the nature of the proceeding in this case, and that the question was merely personal to the defendant, and did not involve any question which could affect such chattels themselves, the case is not entitled to much weight. If chattels real be not within these statutes they will still be protected by the prerogative of the Crown, and as well for a grantee of them from the Crown as for the Crown itself (*s*).

When property in *Ireland* claimed by a subject against the Crown has been, during the period of limitation assigned by the 48 Geo. 3, c. 47, in the actual seisin of the Crown, whatever that may be (*t*), or the Crown has been answered the rents and profits of such property, or of any honour, manor or other hereditament of which such property is part (*u*), or the property has been duly in charge, or has stood *insuper* of record (*v*), such property is unaffected by that act.

What property
in *Ireland*
not affected.

Down to 1861 property in England also, so claimed during the period of limitation assigned by the 9 Geo. 3, c. 16, of which property the Crown had been answered the rents and profits, or those of any honour, manor or other hereditament of which such property was part (*x*), or when such property had been duly in charge, or had stood *insuper* of record, was also unaffected by this last act; but now is not to be recoverable by the Crown

Property in
England for-
merly, but not
now, affected.

(*s*) See *Lambert v. Taylor*, 4 B. & C. 153.

(*t*) See *Tuthill v. Rogers*, 2 Jo. & Lat. 36. Vide sup. p. 70.

(*u*) *Doe v. Roberts*, 13 Mee. & W. 520.

(*v*) See 3 Inst. 189; *Tuthill v. Rogers*, supra.

(*x*) *Doe v. Roberts*, supra.

because merely a part of any such honour, manor or other hereditament, or having been duly in charge, or having stood *insuper* of record (*y*).

Prescriptive
rights against
the Crown.

Prescription may give title or interest to the subject in the freehold or inheritance of the sovereign, as in common, way, or estovers, claimed by prescription in the land of the sovereign (*z*). And claims which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of the Crown, or any land being parcel of the duchy of *Lancaster*, or of *Cornwall*, and also claims which may be so made to any way or other easement, or to any watercourse or the use of any water, to be enjoyed or derived upon, over or from any land or water of the Crown, or being parcel of either of those duchies, are not to be defeated after an enjoyment of the former class of claims for thirty years, and of the latter class for twenty years, by merely showing the origin of the claim; and after an enjoyment of the former for sixty years and of the latter for forty years, when not enjoyed under some consent or agreement in writing expressly given, are rendered absolute and indefeasible (*a*).

Under Pre-
scription Act,

The rights claimed under this statute are only such as are in some way appurtenant to a dominant tenement, and not in gross only (*b*); and although, as between subject and subject, such rights in gross might be considered as within the equity of the statute as suggested by Parke, B. (*c*), yet when claimed against the Crown, they could not be, on that principle (*d*), within the statute.

—not in gross,

—not light.

The access and use of light to and for any building cannot be acquired against the Crown under the sec-

(*y*) 24 & 25 Vict. c. 62, ss. 1, 3.

(*z*) Plowd. 322; Co. Litt. 114 a, b, 119 a, n. 1.

(*a*) 2 & 3 Will. 4, c. 71, ss. 1, 2.

(*b*) *Mounsey v. Ismay*, 3 Hurl.

& C. 486; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

(*c*) *Welcome v. Upton*, 6 Mee. & W. 536.

(*d*) Plowd. 244.

tion 3 of the 2 & 3 Will. 4, c. 71, because in that section the Crown is not named (e).

A claim to a right of common against the Crown, where the Crown is restrained by legislative provision from creating such rights by grant, when enjoyed for a less period than that fixed by the 2 & 3 Will. 4, c. 71, is not sustained by that statute. And showing that such a right could not be created by the Crown by reason of such restraint is not showing that it is determined by showing only the commencement within the period fixed by such statute (f).

Tithes and rents are excepted from the 2 & 3 Will. 4, c. 71, s. 1, but are embraced by the 9 Geo. 3, c. 16, and the 48 Geo. 3, c. 47, in express terms (g).

Again, all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition real or otherwise, are to be deemed good and valid in law after the lapse of certain times, and in certain cases, as will be shown in the next chapter (h).

Such claims of these various incorporeal rights, however, as are in law bad in themselves, *e. g.*, an unlimited right claimed *in alieno solo* (i), cannot be substantiated by user, however long, under the Statutes of Limitation, and are not established by the 2 & 3 Will. 4, cc. 71, 100 (k).

Franchises or liberties are expressly excepted from the statutes 9 Geo. 3, c. 16, and 48 Geo. 3, c. 47, and are synonymous, and defined as a royal privilege, or branch of the Crown's prerogative, subsisting in the hands of a subject (l). To some of these incorporeal

(e) Vide ante, Chap. II. of this Book, Sect. I. p. 243.

(f) *Mill v. The Commissioner of the New Forest*, 18 C. B. 60. See also *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

(g) *Supra*, p. 317.

(h) 2 & 3 Will. 4, c. 100.

(i) *Clayton v. Corby*, 5 Q. B. 415.

(k) See *Att.-Gen. v. Mathias*, 4 Jur., N. S. 630.

(l) *Finch*, L. 164; 1 *Stephen's Com.* 670; 2 *Com.* 37.

How created,

rights a title by prescription cannot, and to others such a title can, be made (*m*). To those to which it cannot be made, the title is by charter only (*n*), and none of them can pass without deed (*o*). When those which are in the king's own hands as parcel of his Crown are granted by him, and come again to him, they are merged in the Crown (*p*), and he has them again *in jure coronæ*, and if appendant to possessions before, the appendancy is destroyed. But when they are erected and created by him *ab initio*, and are not parcel of his Crown, they are not by the accession of them again to the Crown extinct, nor the appendancy of them severed from the possessions (*q*).

—and extin-
guished.

If a grant of a franchise in or over lands be made to a grantee who has the same franchise in or over the same lands by prescription, the prescriptive title would be extinguished (*r*). But if the grant be of the franchise in or over demesne lands and copyhold lands, and the franchise claimed by prescription be in or over the demesne lands only, the prescriptive title in or over the copyholds would be unaffected by the grant (*s*).

In the nature
of a benefit,
are within the
Prescription
Act.

Franchises or liberties in the nature of a profit or benefit so to be taken and enjoyed, as free chase or free warren (*t*), seem to be within the Prescription Act (*u*), but when not of that nature are not within it.

Services.

Services also are expressly excepted from the Prescription Act (*x*). These rights are common to all certain estates, or proper to inheritances, and are either incident to or arise by reservation in respect of tenure (*y*). *Servitium in lege Angliæ regulariter accipitur pro servitio, quod per tenentes dominis suis debetur*

(*m*) Co. Litt. 114 a, b.

(*n*) 9 Rep. 25, 27 b.

(*o*) Ib.

(*p*) Plowd. 219; 9 Rep. 24;
Rea v. Capper, 5 Pri. 217.

(*q*) 9 Rep. 25 b.

(*r*) Com. Dig. tit. Prescription
(*G.*); *The Earl of Carnarvon v.*

Villebois, 13 Mee. & W. 313.

(*s*) *The Earl of Carnarvon v.*

Villebois, *supra*.

(*t*) See *Earl of Carnarvon v.*

Villebois, *supra*.

(*u*) 2 & 3 Will. 4, c. 71.

(*x*) Ib. s. 1.

(*y*) Finch, L. 138, 139.

ratione feodi sui (z). The only tenures now existing are socage, frankalmoign, copyhold, and grand serjeanty, as far as its services are honorary (a), with the services incident to those tenures. And as some of these services of tenure, by their nature, and others of them which by common possibility could not happen within the time of limitation fixed by the 32 Hen. 8, c. 2, were not within that statute (b): so, it is conceived that, with the exception of rent service—so called because accompanied with some corporal service, as fealty at the least (c)—none of these services are within either of these two statutes of Geo. 3; and although some of them are expressly within the 3 & 4 Will. 4, c. 27, yet this statute, as already shown, does not affect the Crown, and they are unaffected by any law of this nature.

The possessions of the Duchy of Cornwall, embraced by the statute applied to them (d), are lands, manors, tenements, rents, tithes, or hereditaments, exclusive of liberties or franchises, mines, minerals, stone, or sub-strata. Possessions of
Duchy of
Cornwall.

The observations already made upon the terms of the two statutes relating to the possessions of the Crown *jure coronæ* embraced by those statutes, and also, as respects rents, advowsons, services and other rights claimed against the Crown not embraced by those statutes, but by the other statutes noticed in this section, are applicable to the terms of the statute applied to the possessions of the Duchy of Cornwall also.

One of the objects of the 7 & 8 Vict. c. 105 was that the rights and estates of the Duke of Cornwall and all other persons in respect of the mines, minerals, stone, and sub-strata in, upon, under, and of certain tenements, What mines
and minerals.

(z) Co. Litt. 65 a.
(a) 12 Car. 2, c. 24; 2 Com. chap. 6.
(b) Co. Litt. 115 a.
(c) Litt. s. 122; Co. Litt. 87 b;
Finch, L. 138.
(d) 7 & 8 Vict. c. 105.

and in, upon, under and of all waste and other lands within certain manors in the county of Cornwall, the mines, minerals, stone, or substrata in, upon, under or of which belonged, or were claimed to belong, to the Duke of Cornwall, and the rights, powers and privileges of the Duke as to getting, selling and disposing of the same, should be declared, established, and regulated. "The Cornwall Submarine Mines Act, 1858"^(e), was for declaring and defining the respective rights of her Majesty, and of the Prince of Wales and Duke of Cornwall, to the mines and minerals in, or under, land lying below high-watermark, within and adjacent to the county of Cornwall, and for other purposes; and enacts ^(f), that the expression "mines and minerals" shall comprehend all mines and minerals, and all quarries, veins, or beds of stone, and all substrata of any other nature whatsoever, and the ground and soil in, upon, and under which, such mines and minerals, quarries, veins or beds of stone, and other substrata lie, and the words "county of Cornwall" shall mean the said county, exclusive of any lands added thereto, or taken therefrom, by the 7 & 8 Vict. c. 61. These two statutes ^(g), as respects mines and minerals, may be considered *in pari materiâ*, and the enactment in the latter statute here stated as a legislative interpretation of the meaning and extent of those terms in the former act.

SECTION II.

Things, exclusive of those the Subject of the last Section, belonging to Persons generally.

The 3 & 4
Will. 4, c. 27,

The things here to be noticed as affected by the laws now under consideration are those to which the statute

^(e) 21 & 22 Vict. c. 109.
^(f) Sect. 8.

^(g) Caps. 105, 109.

3 & 4 Will. 4, c. 27, is applicable, and also those things exclusive of such as are the subject of the last section, to which the statutes 2 & 3 Will. 4, cc. 71 and 100, are applicable.

under the term
"land" applies
to

The 3 & 4 Will. 4, c. 27, is applied to corporeal things real, and also to some things incorporeal, and the former class and one of the latter, tithes, are comprehended under the term land.

The term land as used in this statute, besides its ordinary signification (*g*), and where the nature of the provision or the context of the statute does not exclude the interpretation, is extended to manors, messuages and all other *corporeal* hereditaments whatsoever, and to tithes, and means the inheritance, the freehold of land; and the statute does not deal with land in any other sense than where a person has the right to the land itself (*h*), and where two persons at least claim, adversely to each other, an estate in it (*i*).

—all corporeal
hereditaments,

—tithes,

A canal, the works of, and the tolls payable under the act creating, it (*j*), quarries and limestone (*k*), and veins of coal (*l*) and clay (*m*), are land within the meaning of this statute.

—canal,
—quarries,

Tithe rent-charge is either land, as tithes, or rent as a periodical sum of money payable out of land, within the meaning given to the terms land and rent by this statute (*n*).

—tithe rent-
charge,

A several fishery when it includes, as it may, the soil of a river (*o*), and regarding the soil as the principal,

—a several
fishery,

(*g*) See Co. Litt. 4 a; Touch. 91.

(*h*) 2 De Gex, M. & G. 473.

(*i*) 15 Mea. & W. 622; 10 Ir. L. R. 513.

(*j*) *Hodges v. The Croydon Canal Company*, 8 Beav. 89.

(*k*) *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514; 8 Ell. & B. 145.

(*l*) 11 Mea. & W. 89; Plowd. 330.

(*m*) 1 H. & N. 799.

(*n*) *Sheil v. The Incorporated Society*, 10 Ir. Eq. Rep. 411.

(*o*) See Co. Litt. 4b, n. 2, 122 a, n. 7; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Snape and Uz. v. Dobbs*, 1 Bing. 202; *Doug.* 56; 1 Car. & K. 549; *Holford v. Bailey*, 8 Q. B. 1000; 11 Ib. 426; *Marshall v. The Ulleswater Steam Navigation Company*, 3 Best & S. 782; see also *Malcomson v. O'Dea*, 10 H. L. C. 593.

and the right of fishing as an adjunct thereto (*p*), is a corporeal hereditament, and therefore within this statute.

Share or interest in land.

Any share, estate or interest in land, as that term is here used, is equally with the land itself within that term. Thus dower until assigned is a mere title, and interest *ex vi termini* in legal understanding includes it (*q*), and brings it within the term land (*r*), and whether a freehold or a chattel interest.

Land of any tenure.

The land may be either freehold or copyhold or held according to any other tenure. An heir, whose ancestor had been dead forty years, was refused a mandamus to compel the lord of a manor to admit such heir to copyholds (*s*). But as the admission was only a preparatory step to trying the right, and not necessary to enable an heir to bring an ejectment, the refusal of the writ did not prejudice his right to try his title. On the application by a person not claiming as heir the court, notwithstanding the lapse of more than twenty years since the right accrued, would probably grant the writ.

Copyholds.

But where the right to a copyhold estate is barred by the Statute of Limitations, the Court of Chancery will not entertain, at the instance of the person barred, a suit against the lord to compel admission in order to enable the right to be tried at law (*t*).

Copyholds grantable for lives *successivè*, the first *cestui que vie* having an absolute power of alienation and his widow being entitled to hold them *durante viduitate*, were granted in 1779 accordingly. In 1786 the widow of the first *cestui que vie* surrendered the copyholds and took a regrant of them for the lives of D. and of B. and C., the surviving *cestuis que vie* in the grant of 1779, and intermarried with the first *cestui que vie*, and died leaving her husband surviving, who in 1797

(*p*) Vide supra, pp. 191 *et seq.*

(*q*) Co. Litt. 345 b.

(*r*) *Marshall v. Smith*, 18 Jur., N. S. 1174.

(*s*) *Rees v. The Lord of the Manor of Agardsley*, 5 Dowl. 19.

(*t*) *Widdowson v. The Earl of Harrington*, 1 Jac. & W. 532.

surrendered, and took a regrant of them for his own life and the lives of two other persons, and in 1803 released the copyholds to the owner of the freehold in reversion in fee, in whom it was then vested severed from the manor, who in 1808 devised the property to trustees, and he and they held possession from 1803. In 1858 the second *cestui que vie* in the grant of 1797 claimed the property under it, on the ground that his title did not accrue until the death, in 1857, of the widow of the second *cestui que vie* in the grant of 1779; but the court, although it did not decide the case on the 2 & 3 Will. 4, c. 27, thought that the title of the plaintiff was barred by that statute (*u*).

The right of the lord of a manor to enter on copyholds for a forfeiture is an interest in land within this statute (*v*). Lord's right of entry for a forfeiture.

The term land in legal signification is indefinite, and Mines. includes, not only the surface, but mines and every other thing under, as well as every thing on and above, *cujus est solum ejus est usque ad cælum* (*x*), as part of, but not distinct from (*y*), the surface. In *Reg. v. The Earl of Northumberland* (*z*), it was said *arguendo* that mines unopened would not pass in a grant by the name of mines but as parcel of the soil, and that, by that name, open mines only would pass. Lord Dyer, however, said, that a vein when not opened might be termed a mine, *quia de mineris aliquæ sunt occultæ, et aliquæ apertæ* (*a*).

In various cases it will be presumed that the fee simple of the land carries with it the right to the minerals; but that presumption is not universal, because in mining counties the right to the minerals and the fee

(<i>u</i>) <i>Phillips v. Ball</i> , 6 Jur., N. S. 48.	348.
(<i>v</i>) See Co. Litt. 345 b; <i>Doe v. Hellier</i> , 3 T. R. 162; <i>Whitton v. Peacock</i> , 8 Myl. & K. 325.	(<i>y</i>) Touch. 77, 78; 2 B. & C. 197; <i>Townley v. Gibson</i> , 2 T. R. 701.
(<i>w</i>) Co. Litt. 4 a, b; Touch. 90; <i>Rowbotham v. Wilson</i> , 8 H. L. C.	(<i>z</i>) Plowd. 310.
	(<i>a</i>) See also <i>Saunders' case</i> , 5 Co. 12.

simple of the soil are frequently in different persons; the two things are frequently, for many generations, separate; in conveyances of land the minerals are not uncommonly excepted (*b*).

Severed in title and possession from the land.

The land in fee simple may be vested in one person, and another person may have an exclusive right to the mines under it (*c*), and the possession and the inheritance of them be different from the possession and the inheritance of the land (*d*); and the enjoyment of the soil by the owner of it is perfectly consistent with the right of the owner of the mines to them (*e*).

Minerals, what.

The term minerals, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines, and therefore beds of stone which may be dug by winning or quarrying (*f*). Freestone is a mineral; but in a contract may or may not be included in that term, according to the intention of the parties (*g*).

Where there are minerals capable of being gotten, there, in legal understanding, is a mine, and the moment the minerals are severed they are gotten. There may be no machinery at the place where they are severed; but if men are sent in for the purpose it is the same thing (*h*).

Mines distinguished from quarries.

Mines are distinguished from quarries by the mode of working or getting the minerals which they contain (*i*). A mine, said Kindersley, V.-C. (*k*), is not a

(*b*) *Ross v. Grenfel*, Ry. & Moo. 396; *Seaman v. Vandrey*, 16 Ves. 390; *Barton v. Downes*, Flan. & K. Ir. Rep. 505; *Martin v. Cotter*, 3 Jo. & Lat. 496; *M'Donnell v. M'Kinty*, 10 Ir. Eq. R. 514.

(*c*) 1 M. & S. 84; *Ross v. Grenfel*, supra.

(*d*) 2 Str. 1142; *Cardigan v. Armitage*, 2 B. & C. 197; *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514.

(*e*) 16 Ves. 392; 10 Ir. L. R. 514; supra, pp. 317, 318.

(*f*) *Earl of Rosse v. Wainman*, 14 Mea. & W. 859; *Micklethwait v. Winter*, 6 Ex. 644.

(*g*) *Bell v. Wilson*, 2 Drew. & S. 395.

(*h*) 2 Ad. & E. 598.

(*i*) See *Rew v. Inhabitants of Sedgely*, 2 B. & Ad. 65; *Duchess Dowager of Cleveland v. Meyrick*, 17 L. T. R., N. S. 238.

(*k*) *Bell v. Wilson*, 2 Drew. & S. 395; 1 L. R., Ch. Ap. 398.

quarry, and a quarry is not a mine; for, although we might be puzzled to form a precise definition, there is no doubt about the distinction. A mine, properly speaking, is a driving through the bowels of the earth, or sinking a shaft, and then working horizontally, although, perhaps, not at right angles (*l*); a mine is worked into the superincumbent earth, but a quarry is worked *sub dio*, by casting aside the surface.

Mines generally, or of a particular species, as *fodina plumbi*, may include the land generally (*m*). Cock-

May include land.

burn, C. J., seems to have forgotten this when he asked (*n*), "who ever heard of a grant of the mineral carrying with it the general ownership of the soil?"

When open they are said to be a corporeal hereditament (*o*), but when unopen an incorporeal one (*p*). But it is submitted that in either case and until gotten they are a corporeal hereditament (*q*), and a part of the land; for when on a conveyance of the land they are retained by the grantor, they are *excepted* in the conveyance, and an exception, properly so called, can be of only a part of the thing granted, and they thus remain in him (*r*). It is also submitted that the case of *Doe d. Hanley v. Wood* does not support the proposition of Mr. Preston, that mines unopened are an incorporeal hereditament.

Whether corporeal or incorporeal hereditaments.

Mines unopened, being parcel of, and not distinct from, the land, are not, but mines open are, as land or tenements (*s*), subject to dower (*t*).

Open are subject to dower.

Mines from their nature are exempted from the presumption which non-user (*u*) justifies in other kinds of

Exempt from presumption arising from non-user.

(*l*) See also 2 B. & Ad. 74.

(*m*) Co. Litt. 6 a.

(*n*) 8 Best & S. 748.

(*o*) Prest. Touch. 96.

(*p*) *Ib. cit. Doe d. Hanley v. Wood*, 2 B. & Ald. 724.

(*q*) See *Townley v. Gibson*, 2 T. R. 701; 1 H. & N. 799.

(*r*) Touch. 77, 78; *Earl of*

Cardigan v. Armitage, 2 B. & C. 197; *M^oDonnell v. M^oKinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Wilkinson v. Proud*, 11 Mee. & W. 33.

(*s*) Litt. s. 36.

(*t*) F. N. B. 149 C; *Stoughton v. Leigh*, 1 Taunt. 402.

(*u*) Ante, Book III. Chap. V.

property (*u*). When excepted in a conveyance in fee by the owner of the land they are, both as respects the estate and the possession, severed from the estate and the possession of the land, and remain in him as his separate and independent property, and (*x*) his estate in and possession of them remain unaffected; and until some act be done, or some claim be made, at variance or inconsistent with his right, his possession of them remains unaltered. The mere omission by him or those claiming under him to work them is quite compatible with the intention to preserve and to exercise the right to them (*y*).

Under cus-
tomary free-
holds.

Mines under customary freeholds, that is, copyholds not held at the will of the lord, are vested in the lord, although he cannot work them without the assent of the tenant (*z*).

Adverse title
to.

As between persons working mines adversely to the persons entitled to them, the working for twenty years would give a title to the former against the latter (*a*); but, it would seem, as to only those which have been worked, and not as to those unworked, for the legal presumption, that possession of part is possession of the whole (*b*), is only made in favour of right, and in support of the agreement of parties (*c*).

How the right
to, distinct
from the land,
arises.

The right to mines distinct from the land may arise either by a grant of them, or by a mere licence to enter into the land and to take them, or by an exception of them to the owner of the land, on a disposition by him

(*u*) *Adair v. Shaftoe*, 19 Ves. 156; *Seaman v. Vandrey*, 16 Ib. 390; *Barton v. Downes*, Flan. & K. Ir. Rep. 505; *Martin v. Cotter*, 3 Jo. & Lat. 496.

(*x*) *Earl of Cardigan v. Armitage*, 2 B. & C. 197.

(*y*) *McDonnell v. McKinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562.

(*z*) *Duke of Portland v. Hill*, 12 Jur., N. S. 286.

(*a*) *Rich d. Lord Cullen v. Johnson*, 2 Str. 1142; *Curtis v. Daniel*, 10 East, 273; 8 Ell. & B. 145; *Parrott v. Palmer*, 3 Myl. & K. 632.

(*b*) *Doc d. Earl Falmouth v. Alderson*, 1 Mee. & W. 210; *Taylor v. Parry*, 1 Scott, N. R. 576.

(*c*) *McDonnell v. McKinty*, 10 Ir. L. R. 514.

of the land. But they cannot be claimed by prescription (*d*).

A demise of the mines under certain specified lands (*e*), or of such mines as had been or should be discovered or opened under them (*f*), for a term of years, gives the lessee in them a chattel real. In the former case, however, he would be bound to work them, but not in the latter case.

Demise of, when a chattel real.

A licence or liberty, *ex vi termini*, imports that it is a privilege to be exercised over another man's estate. A man's right of dominion over his own estate is never called a *liberty* (*g*). A licence to enter land and to get the mines therein during a term of years, although conferring an interest, and therefore irrevocable (*h*), gives no estate in the mines, but merely creates incorporeal rights by which the mines so gotten are acquired as chattels (*i*). In *Jones v. Reynolds* (*k*), Lord Denman, C. J.,—referring to *Doe d. Hanley v. Wood*, and stating that one of the reasons for the opinion of the court, that ejectment would not lie for the premises there sued for, was that the terms of the indenture did not amount to a grant of anything for which ejectment lies, but merely to a permission to search and dig for ore,—is reported to have said that it does not seem to follow that that permission, actually demised [granted] and actually exercised, would not be a hereditament enjoyed by the lessee; a hereditament being, in Lord Coke's well-known words (*l*), whatsoever may be inherited, be it corporeal or incorporeal, real, or personal, or mixed (*m*). The permission or licence in the

Licence to enter and get. It's nature,

(*d*) *Wilkinson v. Proud*, 11 Mee. & W. 33.

(*e*) See *Doe d. Hanley v. Wood*, 2 B. & Ald. 727; *Taylor v. Parry*, 1 Scott, N. R. 576; *Keyse v. Powell*, 2 Ell. & B. 145.

(*f*) *Quarrington v. Arthur*, 10 Mee. & W. 335.

(*g*) 10 East, 205.

(*h*) 2 B. & Ald. 738; *Mushett v. Hill*, 5 Bing. N. C. 694.

(*i*) *Doe d. Hanley v. Wood*, 2 B. & Ald. 724; *Roberts v. Davey*, 4 B. & Ad. 665; *Normay v. Rowe*, 19 Ves. 158.

(*k*) 4 Ad. & E. 805; 6 Nev. & M. 441.

(*l*) Co. Litt. 6 a.

(*m*) 3 Rep. 2; Pres. Touch. 91.

case of *Doe v. Wood* was for years, and was therefore a mere chattel interest in a hereditament, but not itself a hereditament. If the licence had been given in perpetuity, or so as to be to any extent inheritable, it would have been a hereditament (*n*).

— and operation.

The licence, so far as it gives a right of entry, operates as a licence properly so called, but so far as it gives the grantee a right to take the mines is in the nature of a grant of such of the ores as shall be gotten, but gives him no estate in them before they are gotten (*o*). He has no estate or property in the land itself or any particular portion thereof, or in any part of the ore, metals or minerals, ungot therein, but only a right of property as to such part thereof as, upon the licence, shall be dug or got, no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it; and, unless he have actually opened and worked and be in the actual possession of the mines, he cannot maintain an action of either trespass or ejectment (*p*), but only case (*q*).

When not exclusive of grantor.

A licence to get mines, unless expressed to be exclusive of the owner of the land, is not necessarily and in itself of that nature (*r*); and a claim of them as a common by prescription cannot be exclusive (*s*).

Nature of the interest under a licence.

Mines to be taken under a mere licence to enter upon the land and take them, as distinguished from a grant of them (*t*), have been said to be merely a profit à prendre in alieno solo (*u*). If so, they are not, as be-

(*n*) Co. Litt. 6 a; 3 Rep. 2; 2 Salk. 239.

(*o*) *Thomas v. Sorrell*, Vaugh. 351; *Doe d. Hanley v. Wood*, 2 B. & Ald. 725; *Muskett v. Hill*, 5 Bing. N. C. 694.

(*p*) *Cheetham v. Wilkinson*, 4 East, 469; 2 B. & Ald. 737, 739; *Muskett v. Hill*, 5 Bing. N. C. 694.

(*q*) See *Harris v. Ryding*, 5 Mee. & W. 60.

(*r*) See *Lord Mountjoy's case*, Godb. 18; 1 And. 307; 4 Leon. 147; *Cheetham v. Wilkinson*, 4 East, 469; 2 B. & Ald. 739.

(*s*) Co. Litt. 122 a.

(*t*) See *Doe d. Hanley v. Wood*, 2 B. & Ald. 727.

(*u*) See Prest. Touch. 90, 96; 19 C. B., N. S. 709.

tween adverse claimants of them, within the Prescription Act, 2 & 3 Will. 4, c. 71, for that act applies between only the claimant of such a profit on the one hand and the owner of the land out of which the profit is taken on the other (*x*), and then only when such profits are in some way appurtenant to a dominant tenement and not in gross only (*y*); for mines until severed are part of the land (*z*), and land cannot be claimed as appurtenant to land (*a*), and such profits are not within the 3 & 4 Will. 4, c. 27 (*b*), for the only incorporeal rights to which it is applied are tithes belonging to any person other than a spiritual or eleemosynary corporation sole, rents, heriots, services and suits, for which a distress may be made, annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to such a corporation.

A grantor seised in fee of land excepting, in a conveyance in fee by him of the land, the mines in and under it, retains them as he had them before the conveyance, and they are never out of him, but become, by the exception, a distinct hereditament in him (*c*); and the grantee of the land acquires neither the possession nor any species of rights or interest in them (*d*), but only the surface, subject to the right to enter and get the mines (*e*). The exception, both as to the estate and the possession, severs them from the estate and the possession of, and makes them separate and distinct from,

Effect of exception of mines in a conveyance.

(*x*) See *Hanmer v. Chance*, 34 L. J., N. S., Ch. 415.

(*y*) *Mounsey v. Ismay*, 3 Hurl. & C. 486; *Shuttleworth v. Lo Fleming*, 19 C. B., N. S. 687.

(*z*) Touch. 77, 78; 1 B. & C. 197.

(*a*) 1 Vent. 386; *Tyringham's case*, 4 Co. 86 b; *Att.-Gen. v. The Corporation of London*, 12 Beav. 8; *Wilkinson v. Proud*, 11 Mee. & W. 33.

(*b*) *Boers v. Fleming*, 11 L. T. R., N. S. 49.

(*c*) *Earl of Cardigan v. Armitage*, 2 B. & C. 197; 2 B. & Ald. 724; *Harris v. Ryding*, 5 Mee. & W. 66; *Dand v. Kingscote*, 6 Ib. 174.

(*d*) *McDonnell v. McKinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562.

(*e*) *Doe d. Earl Falmouth v. Alderson*, 1 Mee. & W. 210.

the land. The exception of the mines would of itself give the right to work them, and an express power for that purpose may be such, in terms, as to demonstrate an intention to recognize and effectuate that right (*f*).

Extent to which owner may get them.

The owner of the mines distinct from the land cannot, however, get every particle of them, but only so much of them as is consistent with the enjoyment of, or as will leave a reasonable support to, the surface (*g*).

Tithes.
3 & 4 Will. 4,
c. 27.

The things incorporeal to which the 3 & 4 Will. 4, c. 27, is applied, and under the term land, are tithes belonging to any person, other than a spiritual or eleemosynary corporation sole.

Meaning of the term in.

The term tithes is used in only the sections 1 and 43, and in its ordinary signification, and not, like the terms land and rent, in any more extended sense; and, with reference to the period of limitation applied to tithes, as a chattel only, and the jurisdiction, where such period is applicable, seems to be employed in the latter section quite consistently with the term as included in land in section 1.

Is ambiguous.

The term tithes, however, like the term rent, is ambiguous; it may mean either the estate in the tithes, or the tithes themselves as a chattel, the fruits of the estate (*h*). It would therefore seem to follow, unless there be some reason against it, that if land represents tithes, tithes being to be represented by land, must be subject to the same rule of construction, and open to the same interpretation as land itself. There are two subjects—land, rent. Rent means the subject of inheritance; land has the same signification;—must not therefore tithes, which are represented by and treated as included in land, mean, *primâ facie*, the very same

(*f*) 10 Ir. L. R. 514.

(*g*) *Harris v. Ryding*, 5 Mee. & W. 60; *Humphries v. Brogden*, 12 Q. B. 739; *Rowbotham v.*

Wilson, 6 Ell. & Bl. 593; 8 Ib. 123; 8 H. L. C. 360.

(*h*) 15 Mee. & W. 622.

thing? There is clearly the same subject for the act to operate upon. There was also clearly the same intention as regards the barring of adverse claims (*i*).

In a suit for subtraction of tithes by an ecclesiastical corporation aggregate against the occupier of the land, Lord Langdale, M. R., held that the nonpayment or nonrender of tithes by the occupier to the owner for twenty years barred the title of the latter to them (*h*), under this statute. This decision was questioned (*l*), and on appeal was reversed; and Lord St. Leonards, C., held that although tithes are included in the term land, with the exception of those belonging to spiritual or eleemosynary corporations sole, which were not intended to be touched, this statute applies to only an estate in tithes and not to them as a chattel, or, in other words, in the case only of a render of tithes by the person bound to render them to the person who is entitled to receive them (*m*).

As in the case of land (*n*), so in that of tithes, the operation of the 3 & 4 Will. c. 27, is confined to those cases where there are two parties claiming an adverse estate in the tithes (*o*). Therefore a person who has received no tithes for twenty years cannot recover the possession of them from another who has for twenty years received those tithes from the terretenant (*p*).

How to be claimed under that act.

To tithes as a chattel, the statute 2 & 3 Will. 4, c. 100, is applied, and provides a limitation to protect the terretenant in his prescriptive mode of rendering them to the clergyman or titheholder (*q*). It has relation to

As chattels, are within 2 & 3 Will. 4, c. 100.

(*i*) 2 De Gex, M. & G. 473.

(*h*) *The Dean of Ely v. Bliss*, 5 Beav. 581.

(*l*) *Shiel v. Incorporated Society*, 10 Ir. Eq. R. 411.

(*m*) *Dean of Ely v. Bliss*, 2 De Gex, M. & G. 459; *Lord Shannon v. Hodder*, 2 Ir. L. R. 223, n.; *Shiel v. Incorporated Society*, 10 Ir. Eq. R. 411.

(*n*) *Supra*, p. 331.

(*o*) *Dean and Chapter of Ely v. Cash*, 15 Mee. & W. 617; *Shiel v. Incorporated Society*, 10 Ir. Eq. R. 411.

(*p*) 15 Mee. & W. 622.

(*q*) *Dean and Chapter of Ely v. Cash*, 15 Mee. & W. 617; 2 De Gex, M. & G. 469.

the subtraction of tithes, the 3 & 4 Will. 4, c. 27, to recovering "the possession or seisin of them."

Jurisdiction of ecclesiastical courts in determining right to.

The Ecclesiastical Courts have not only the power of holding plea for the subtraction and withholding of tithes as a personal duty in all cases, but they have in some cases the power of determining the right to tithes. Thus where the right to tithes is in dispute between two ecclesiastical persons in their ecclesiastical characters, or, as it seems, between a lay impropiator and an ecclesiastical incumbent claiming tithes as a mere ecclesiastical right, the question is properly triable in the spiritual courts and the courts of common law will not interfere (*r*). Hence the section 43 of the 3 & 4 Will. 4, c. 27, that in a suit to recover tithes in the spiritual court, the same period of limitation should apply as in suits for that purpose at law or in equity (*s*). For the recovery of tithes as a chattel, the person had his remedy both in courts of equitable jurisdiction and those of ecclesiastical jurisdiction, and therefore the object of the legislature would seem to be to assimilate the periods for the recovery of them in both jurisdictions.

Sect. 43 of c. 27.

Operation of that section.

It is very difficult to say how this clause was intended to operate. It has been insisted (*t*), that it proves clearly that in it the legislature was dealing with tithes as a chattel, even though it may be admitted that in the previous sections it was dealing with tithes as an inheritance. But there is this difference between the 24th and the 43rd sections, namely, when in the 24th section the legislature is speaking of a remedy in equity being only co-extensive with the right at law, it is speaking of the right to recover "by virtue of the provisions hereinbefore contained;" when, however, it is speaking in the 43rd clause, in which it is intended to bind the

(*r*) 2 *Eagle on Tithes*, 295. See cases on this point in *Vin. Ab. tit. Prohibition* Z., 8vo. ed., vol. 18.

(*s*) 10 *Ir. Eq. Rep.* 419.

(*t*) See *Dean of Ely v. Bliss*, 2 *De Gex, M. & G.* 459.

proceedings in spiritual courts, no reference is made to "the provisions hereinbefore contained," but it appears to be a general provision, dealing generally with all rights of action or suit, and merely meant to prevent proceedings in the spiritual courts to recover tithes or moduses, by persons who could not within the same time have recovered at law or in equity, leaving it entirely open under what provisions or what acts of parliament that remedy might be enforced (*u*).

Comprehensive as the term land, as used in this statute, is, however, some subjects of property are not embraced by this statute. Thus, neither turnpike tolls (*x*) nor canal rates alone are land either in the usual and proper meaning of that term independently of this statute, or in the extended meaning given by this statute to that term (*y*).

Term "land" in c. 27, what not within.

Amongst other kinds of incorporeal property, rent properly so called, and also, under that term, where the nature of the provision or the context of the statute does not exclude the signification, other kinds of such property of an analogous nature, as annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole, are embraced by the 3 & 4 Will. 4, c. 27.

Rent.

The term rent, in its ordinary signification, includes not only all pecuniary rents, but also all rents consisting of profit which lies in render, office, attendance, and such like (*z*).

What it includes.

As in the case of tithes, but to a greater extent, the term rent, as used in this statute in its ordinary and proper sense, is necessarily ambiguous. It is used sometimes in the sense of a rent charged on lands (*a*), some-

Is ambiguous.

(*u*) Per Lord St. Leonards, 2 De Gex, M. & G. 475.

Canal Co., Ib. 86.

(*x*) *Mellish v. Brooks*, 3 Beav. 22.

(*z*) Co. Litt. 142 a, 162 b.

(*y*) *Hodges v. The Croydon*

(*a*) *Paget v. Foley*, 2 Bing. N. C. 679; *James v. Salter*, 3 Ib. 544; *Grant v. Ellis*, 9 Mee. & W.

times in the sense of a rent reserved under a lease (*c*), and sometimes, in some sections, in both senses (*d*). In the section 15 the term interest, which is in the parliamentary roll, is used by mistake for the term rent. But the nature of the provision in which this term rent is found, or the context, will generally remove the ambiguity (*e*), and restricts, when required, the extended signification, *secundum subjectam materiam*.

Rents within
c. 27.

The rents to which the statute, looking to its title, seems to be most pertinent, are those which are a charge on land, and for which an assize would lie (*f*), as an annuity for life (*g*), ancient quit rents (*h*), ancient rent service, fee farm rents (*i*), or the like, existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had that remedy (*k*), and either where there are two persons, each of whom claim an estate in them adverse to the other (*l*), or where the owner of the land claims to hold it free from such charge (*m*).

Out of incorporeal hereditaments.

Although there may be no absolute absurdity in supposing that a person seised in fee, or for life, of a rent-charge might for a gross sum of money demise it for years or at will, at a smaller rent (*n*); yet at common law, except in the case of the king (*o*), rent cannot

113; *Doe d. Angell v. Angell*, 9 Q. B., N. S. 328; *Archbishop of Dublin v. Lord Trimlestown*, 12 Ir. Eq. Rep. 251; see also *Dean of Ely v. Cash*, 15 Mee. & W. 617; *Warren v. Bateman*, Flan. & K. Ir. Rep. 448.

(*c*) *Doe d. Angell v. Angell*, supra.

(*d*) *Ib.*

(*e*) *Grant v. Ellis*, supra; *Daly v. Lord Blomfield*, 5 Ir. Law Rep. 65; 2 De Gex, M. & G. 471; *Owen v. De Beauvoir*, 16 Mee. & W. 566; 5 Ex. 166; *Doe d. Angell v. Angell*, supra.

(*f*) *Paget v. Foley*, supra.

(*g*) *James v. Salter*, supra.

(*h*) *Owen v. De Beauvoir*, supra.

(*i*) 1 Inst. 143 b, n. 5; 2 Ib. 44; Dong. 627, n.

(*k*) *Grant v. Ellis*, supra; *Owen v. De Beauvoir*, supra; 2 De Gex, M. & G. 472. See also *Dean of Ely v. Cash*, 15 Mee. & W. 617.

(*l*) *Dean of Ely v. Cash*, supra; *Re Turner's Estate*, 11 Ir. Eq. Rep., N. S. 304.

(*m*) *James v. Salter*, supra; *Owen v. De Beauvoir*, supra.

(*n*) 9 Q. B., N. S. 356.

(*o*) *Lord Mountjoy's case*, 5 Rep. 3.

be granted or reserved out of incorporeal hereditaments (*p*), or mere rights, or personal chattels (*q*), because the remedy for the recovery could not be either by distress or by assize (*r*). But such a reservation is good to bind the lessee by way of contract, and for which the lessor may maintain an action of debt (*s*). Since the 3 & 4 Will. 4, c. 27, however, an annual sum charged upon tithes is a rent within this statute, for the term rent, as there used, includes all annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to spiritual or eleemosynary corporations sole, and the term land includes tithes other than those belonging to such corporations.

A sum in gross charged upon or payable out of land or other corporeal hereditaments within that term, under sect. 1 of c. 27, by instalments, is a periodical sum of money within the term rent under that section (*t*). But charged upon or payable out of any *rent* is neither land nor rent within this statute.

Not even all rents proper, however, are within the term rent in the extended signification given to it in this statute. Thus conventional rents, or rents reserved on a common demise of property, are not within the statute under the term rent used in its most extensive signification (*u*); and rent payable for land, although not incident to any reversion therein, but to which there is a mere possibility of reverter, is such a rent (*x*), although in point of law a rent-charge, but not within the section 2. So rents so reserved in the nature of penal rents for breaking up pasture land, or pursuing a

Gross sums payable by instalments.

What rents proper not within c. 27.

(*p*) Co. Litt. 47 a, 142 a, 144 a; *Dalston v. Reeve*, Lord Raym. 77.

(*q*) *Spencer's case*, 5 Rep. 17.

(*r*) Gilb. on Rents; Bro. Abr. Assize, pl. 2; Co. Litt. 47 a, 142 a, 144 a.

(*s*) *Windsor v. Gover*, 2 Saund.

302.

(*t*) *Uppington v. Tarrant*, 12 Ir. Ch. Rep. 262.

(*u*) *Grant v. Ellis*, 9 Mee. & W. 113; *Re Turner's Estate*, 11 Ir. Eq. 304; 2 De G., M. & G. 472, 473.

(*x*) *Re Turner's Estate*, supra.

forbidden course of tillage(*z*); and whether the demises on which such conventional rents are reserved be for lives or only for years(*a*).

Rents payable every twenty years or upwards.

In the case of rent payable every twenty years, or at a longer interval, the anomalies and difficulties arising upon several provisions of the statute, and especially upon the first branch of the section 3, making the right to distrain for a rent to have first accrued at the last time the rent is received, have been pointed out(*b*). If the twenty years fixed by the section 2 be calculated from that time, great injustice may be inflicted upon the owners of such rents. But this injustice would seem to show and would afford ground for holding that, either from the nature of the section 3, or by the context, such rents are not included in the first branch of it, but fall under the general enactment in the second section; so that each particular amount of rent due may be recovered within twenty years, or are not provided for by the statute at all, but left in the same condition as if the act had not passed.

Periodical sums charged on incorporeal hereditaments.

Annuities or periodical sums of money charged upon any incorporeal hereditaments, other than tithes(*c*), are not included in the term rent as used in this statute. For, as just stated, at common law, except in the case of the king, rent cannot be reserved out of such hereditaments or mere rights, or personal chattels(*d*); and therefore an annual sum charged upon or payable out of such hereditaments, (excepting tithes,) as a piscary, common, franchise(*e*), hundred, fair, advowson(*f*), rent(*g*), is neither a rent nor an annuity, nor a periodical sum of money within the 3 & 4 Will. 4, c. 27. For only such charges of

(*z*) *Daly v. Blomfield*, 5 Ir. L. R. 65.

(*a*) *Ib.*

(*b*) See *Owen v. De Beauvoir*, 16 Mee. & W. 547.

(*c*) *Supra*, pp. 340, 344.

(*d*) *Supra*, p. 345.

(*e*) Co. Litt. 47 a, 144 a; 3 Best & S. 744.

(*f*) *Butts' case*, 7 Rep. 23 b.

(*g*) 2 Roll. Abr. 446; Bro. Abr. Assize, pl. 2; Keilw. 161.

that description as are charged upon or payable out of only land are within the statute, and that term, although made to include tithes, other than those belonging to a spiritual or eleemosynary corporation sole, embraces hereditaments of only a corporeal nature; and such charges, even if they can be deemed suits or services, are not within the statute, for it embraces only such as may be distrained for, and these charges so created cannot be so recovered (*h*). These charges, therefore, when created by deed, unless they are within the 3 & 4 Will. 4, c. 42, are not affected by any Statute of Limitation (*i*).

Moduses, and compositions belonging to spiritual or eleemosynary corporations sole, are not within the term rent, as annuities or periodical sums of money charged upon or payable out of any land, but are expressly excepted from this statute. Moduses, &c. of certain corporations.

Under the term rent, besides rent proper, heriots, and also all suits and services for which a distress may be made, unless the nature of the provision or the context excludes them, are embraced by this statute. Heriots, &c. which may be distrained for.

Heriots are distinguished into heriot service and heriot custom, and although the latter be a service for which a distress cannot be made (*h*), and therefore, as such, would not be within this statute, yet, as it makes no distinction between the two classes of heriots, but uses the term heriot generally, heriot custom is within the statute. Heriots.

If rents consisting of profit which lies in render, office, attendance, or such like (*l*), and for which a distress may be made, be not rent within the ordinary signification of that term, they would fall under the term services. Rents in render.

(*h*) Supra, p. 345. (*h*) Bradby, 102.
 (*i*) 1 Inst. 115 a; 4 Co. 86; (*l*) Co. Litt. 142 a. See also
Foster's case, 8 Co. 65; 10 Ves. 7 Q. B., N. S. 976, 983.
 467; 13 Pri. 721; 5 Ex. 18.

Fealty.

Fealty is a service for which a distress may be made (*m*), and therefore, under the term "rent," as used in 3 & 4 Will. 4, c. 27, s. 1, is within that statute. The service still remains, and if required may be repeated on any change in the tenancy, on a purchase or descent (*n*), or other transfer of the interest of either party to the tenancy, and may be expressly reserved, either annually or oftener (*o*); and as it preserves the memory of the tenure, and therefore of the title of the lessor, is even now of considerable importance (*p*); and as it may be performed at intervals exceeding twenty years, may still, as formerly (*q*), not be barred until long after that period (*r*). If after it ought to be performed, but is not, more than twenty years elapse, it would seem to be barred under the section 2 of this statute.

Nature of these heriots, &c., and how to be claimed.

These heriots, suits, and services, like rent proper itself (*s*), must be of inheritance distinct from the land, and not merely conventional, and where either there are two persons each of whom claim an estate in them adverse to the other, or the owner of the land subject to them claims to hold it free from them.

Due at uncertain intervals.

In the case of heriots and other similar rights which become due at uncertain intervals great injustice would result to the person entitled to them if the right to dis-train for them is to be held, according to the first branch of the 3rd section, to have first accrued at the expiration of twenty years from the last render. But the answer to that objection would probably be, that, although such heriots are included under the word rent, yet as that is only where the nature of the provision or the context does not exclude such a construction, such injustice would afford ground for holding that in that branch of

(*m*) Co. Litt. 150 b.

(*n*) 2 Scriv. Co. 614, 4th ed.

(*o*) See *Bevill's case*, 4 Rep. 3.

(*p*) Co. Litt. 68 b, n. 5.

(*q*) *Bennet v. King*, 3 Lev. 21; Co. Litt. 115 a.

(*r*) See *Owen v. De Beauvoir*, 16 Ves. 547.

(*s*) Vide *supra*, p. 344.

the section the word rent does not include heriots, and the case falls under the general enactment in the second section, so that each particular heriot due may be recovered within twenty years, or is not provided for by the statute at all, and is left in the same condition as if the act had not passed (*t*).

Keeping up a grindstone, and allowing the inhabitants of a township the use of it, by the holder of property, has nothing of the character of a rent, or of the profits of land, within the section 3 (*u*), or of a service for which a distress could be made (*x*); or even if a rent it must be rendered to the person claiming the land, as receipt of the profits of it. But in the case last cited the land was claimed by persons whom the jury found had never been owners of the land.

What not rent or profits within sect. 3 of c. 27.

In *Doe d. Edney v. Benham* (*y*), and *Doe d. Edney v. Billett* (*z*), the court seems to have considered that the sweeping of a church and the ringing a church bell would be services within the meaning of the term rent in the section 1. If so the keeping a grindstone for the benefit of the lessor, but not of strangers, would be of the same nature (*a*). According to the authorities cited by the court such services would be in the nature of rent at common law, and for which a distress might be made, and might be "profits of the land" within the section 3 and other sections, and rent payable in respect of the tenancy in respect of which they were to be rendered. But such services reserved on a demise would be mere conventional rents, and therefore not within the c. 27 (*b*).

What services are rent within sect. 1.

Land and rent, when claimed for an estate of only an equitable nature, equally when claimed for a legal

Equitable estates in,

(*t*) See *Owen v. De Beauvoir*, 16 Mee. & W. 547.

(*a*) *Doe d. Robinson v. Hinde*, 2 Moo. & Rob. 441.

(*x*) 7 Q. B., N. S. 978.

(*y*) *Ib.*

(*z*) 7 Q. B., N. S. 983.

(*u*) See *Doe v. Hinde*, *supra*.

(*b*) See *Paget v. Foley*, 2 Bing. N. C. 679; *James v. Salter*, 3 Ib. 544; *Grant v. Ellis*, 9 Mee. & W. 113.

— and pecuniary charges on land and rent.

estate, is also within the statute (*d*), and money considered as land (*e*), and *è converso* (*f*).

Considerable difference of opinion upon the question, whether pecuniary charges upon land or rent be included in those terms used in the sections 24 and 25, has arisen. In *Young v. Wilton* (*g*), Smith, M. R., said the subject of section 25, as was stated by the late M. R. in the case of *Knox v. Kelly* (*h*), being land or rent, in which it is impossible, from the interpretation clause, to comprise a gross sum of money charged on the estate. In *Hunt v. Bateman* (*i*), Richards, B., said “some learned judges have held that the words ‘land and rent,’ as used in the section 25, ought to be construed as extending to money charges affecting lands, such as debts. . . . That is certainly a strong construction to give to the language of this section; and I am afraid if the matter was *res nova* that I would scarcely have the courage so to interpret the terms ‘land or rent.’” And Lefroy, B., said the 25th section relates only to suits to recover the land itself, and cannot by any possible construction be extended to a suit to raise a sum of money off the land; and in *Gyles v. Gyles* (*k*), Brady, L. C., said that the case of a charge of money upon land is not within the terms or the true construction of the 25th section, and that it was not necessary to seek for a strained and a non-natural interpretation of its language, which, he said, is properly and plainly to be applied to the principal subjects of ownership, land or rent, having nothing further in contemplation. But, he added, as the 7th section had been used at law (*l*), in construing the 3rd section, to give full effect to the general policy of the act to both those sections, so also the 24th and

(*d*) Sects. 24, 25.

(*e*) *Ex parte Breach, Re the Charing Cross Act*, 10 Jur., N. S. 982.

(*f*) *Pemsey v. Baines*, 20 L. J., N. S. Eq. 393.

(*g*) 10 Ir. Eq. Rep. 10.

(*h*) 6 Ir. Eq. Rep. 285.

(*i*) 10 Ir. Eq. Rep. 360.

(*k*) 9 Ir. Eq. Rep. 135.

(*l*) *Garrard v. Tuck*, 8 C. B. 231.

25th sections, might be so used in furtherance of the same policy, in the cases of express trust.

On all these occasions, however, the interpretation of the term "land" in these two latter sections seems to have been narrower than either the nature of the provision or the context required. For by the 1st section that term, except where that nature or the context excludes the construction, is to include not only the corpus of the land itself, but also any "share, estate or interest" in the land, whether a freehold or a chattel interest; and the term "interest," *ex vi termini*, in legal understanding, extends to estates, rights and titles in, to, or out of lands (*m*). Thus money expressly charged on land (*n*), the lien of a vendor of land for his unpaid purchase-money (*o*), a judgment debt (*p*), are interests in land within the meaning of the term interest as used in the so-called Mortmain Act (*q*). In the 24th section, the primary provision in relation to lands claimed in equity are used the terms estate, interest or right, and the last of these three terms, although less comprehensive than the second, has still a wide signification (*r*); and the main object of the following section 25 is to exclude from the operation of the section 24 all cases involving claims under express trusts (*s*), and therefore applicable to the same subjects as those embraced by the section 24. Not only, therefore, land itself, but also mere charges upon it, at least when raiseable by express trust, would seem to be within the express terms of the section 25. In *Burrowes v. Gore* (*t*), Lord St. Leonards said there is always a difficulty in applying the statute when you come to trusts, not with regard to

Effect of the interpretation of term "land" as to such charges.

(*m*) Co. Litt. 345 b.

(*n*) *Arnold v. Chapman*, 1 Ves. 108; *Att.-Gen. v. Horley*, 5 Mad. 321.

(*o*) *Harrison v. Harrison*, 1 Russ. & M. 71.

(*p*) *Collinson v. Pater*, 2 Ib.

344.

(*q*) 9 Geo. 2, c. 36.

(*r*) Co. Litt. 344 a, 345 b.

(*s*) See *Knight v. Bowyer*, 23 Beav. 610; 2 De Gex & J. 421; *S. C.* on appeal.

(*t*) 6 H. L. C. 907.

land itself, but with regard to charges upon land. . . . It is perfectly settled that the effect of a charge to be raised by express trust falls within the saving as much as if the express trust had been applied, not to charges upon the land but, to the land itself.

Charge when not enforceable.

A charge upon land, when the title to the land has been barred, would seem to be incapable of being enforced (*u*).

Redemption of mortgages.

The redemption of mortgages of land and rent is the subject of a separate provision (*x*), which, however, does not, in terms, embrace mortgages of advowsons. And this provision contemplates ordinary mortgages only, where the equity of redemption is asserted as a mere equity against the right of a mortgagee in possession, whose right has become absolute at law, and is inapplicable to cases of absolute conveyance with a privilege for the grantor to repurchase the property (*y*).

Advowsons.

The remaining incorporeal things to which the 3 & 4 Will. 4, c. 27, is applied are advowsons of ecclesiastical benefices, and as well in Ireland, after 1843 (*z*), as in England, but not in Scotland (*a*).

Species of.

Advowson, *advocatio* (*b*), is a generic term, and the meaning of it has been already shown (*c*).

Advowsons are of several species, as of churches (*d*), of hospitals and other houses (*e*), of prebends (*f*), which although held by a spiritual person have not of necessity *cura animarum* (*g*), and the like; and are either presentative, collative, donative, or elective (*h*).

(*u*) 2 De Gex, M. & G. 597.

(*x*) Sect. 28.

(*y*) See *Alderson v. White*, 3 Jur., N. S., 1316; 4 Ib. 125; 2 De G. & J. 97, *S. C.*

(*z*) 6 & 7 Vict. c. 54.

(*a*) Sects. 30, 31, 32, 33, 44.

(*b*) See Cary's Litt. 42.

(*c*) Ante, p. 321.

(*d*) 13 Edw. 1, stat. 1, c. 5; 17 Edw. 2, c. 1; Co. Litt. 119 b.

(*e*) 13 Edw. 1, stat. 1, c. 5, s. 4;

Co. Litt. 342 a; God. Repert. Can. 208; *Att.-Gen. v. Exelme Hospital*, 17 Beav. 465; *Att.-Gen. v. St. Cross Hospital*, Ib. 485.

(*f*) F. N. B. 32 H.

(*g*) See 7 B. & C. 189; 8 Bing. 551.

(*h*) Co. Litt. 119 b; 344 a; *Att.-Gen. v. St. Cross Hospital*, supra; *Att.-Gen. v. Exelme Hospital*, supra; Co. Litt. 342 a.

The advowsons of hospitals and other houses and the Lay. like, of sinecures, *sine cura animarum*, although the master, principal or other person the head of them, be a spiritual person, are not, on that ground, spiritual, but mere lay foundations (i).

The advowson of a church, *advocatio ecclesiæ*, always Spiritual. intends a parsonage (k). But there are advowsons of Presentative. vicarages, of prebends, and of chapels (l). These advowsons are the right of a person to present, or to collate or confer on, a clerk selected by himself (m), or to nominate a clerk to be presented, or, in the case of a donative, to be appointed (n), by another person (o); and are so called because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church, who were called *advocati* and *patroni* (p), as having the gift of a benefit (q), and thereupon the advowson is called *jus patronatus* (r).

Advowsons of ecclesiastical benefices donative differ, Donatives. in several important particulars, from those which are presentative. In general, without some evidence expressly showing an ecclesiastical benefice to be donative and exempted from the jurisdiction of the ordinary, the benefice will not be taken to be of that nature (s).

The origin of donatives is involved in obscurity and Origin of. uncertainty (t). Their nature, however, is, in general, well understood. They are ecclesiastical benefices (u), have all the properties of such benefices, especially

(i) Co. Litt. 342 a; *Att.-Gen. v. Exchequer Hospital*, supra; *Att.-Gen. v. St. Cross Hospital*, supra. See also 7 B. & C. 189; 8 Bing. 551.

(k) F. N. B. 32 H.

(l) Ib. 31 C, 32 H.

(m) Co. Litt. 119 b.

(n) F. N. B. 48 C.

(o) Plowd. 528; *Shirley v. Underhill*, Moo. 894; *Reg. v. The*

Trustees of Orton Vicarage, 14 Q. B., N. S. 139.

(p) God. Repert. Can. 205.

(q) Cary's Litt. 602.

(r) Co. Litt. 17 b, 119 c.

(s) Per Maule, J., 2 C. B. 696.

(t) See Co. Litt. 344 a; God. Repert. Can. 145, 202; 7 B. & C. 158 *et seq.*

(u) Wat. Cler. Law, 171; God. Repert. Can. 202, *contra*.

when with cure of souls (*x*), are within the statute of simony, though that statute speaks of presentation only (*y*), are ecclesiastical promotions within the 7 Ann. c. 18, are not presentative, but may become so (*z*), may be resigned to the donor or patron (*a*), and when vacant at the death of the patron the right of nomination thereto belongs, not to his executor, as in the case of a benefice presentative (*b*), but to his heir (*c*), and vest in the incumbent by the mere appointment of the patron without institution or induction (*d*); and such appointment is, or amounts to, the same as presentation, institution and induction to a presentative benefice (*e*), and is said to be a collation or conferring thereof, as in the case of the collation or conferring by a bishop (*f*).

Perpetual
curacies.

Perpetual curacies are also said to be *quasi* donatives (*g*), but not ecclesiastical benefices (*h*), and the nomination thereto, like donatives, is without presentation, institution or induction, and the curate is only admitted thereto (*i*), and, without the licence of the bishop, is not in possession (*k*), and cannot officiate therein (*l*). These curacies, however, are ecclesiastical promotions within the 7 Ann. c. 18.

Two classes of. These curacies may be divided into two classes, those which have a place of divine worship and parochial rights,

(*x*) 3 Wils. 365.

(*y*) 3 Lev. 83.

(*z*) Co. Litt. 344 a; *Farchild v. Gayre*, Cro. Jac. 63; *Reg. v. Foley*, 2 C. B. 664.

(*a*) Co. Litt. 344 a; *Farchild v. Gayre*, Cro. Jac. 63. See *Rennell v. The Bishop of Lincoln*, 7 B. & C. 158.

(*b*) F. N. B. 33 P.; Co. Litt. 249 a, 378 b.

(*c*) *Repington v. Tamworth School*, 2 Wils. 150; 7 B. & C. 161, 175, 188; 8 Bing. 518; 3 Bing. 282.

(*d*) *Powell v. Milburn*, 3 Wils.

355, 365; 1 T. R. 403; 7 B. & C. 160.

(*e*) *Per De Grey*, C. J., 3 Wils. 363.

(*f*) *Yelv.* 60; *Wat. Cler. L.* 170; *Degge's Par. Coun.* 204; F. N. B. 33 E, 35 E, 37 D; 7 B. & C. 161; 3 Bing. 278.

(*g*) *Wat. Cler. Law*, 172.

(*h*) *Weldon v. Green*, 2 Burn's E. L. 55.

(*i*) See *Cooke v. Elphin*, 5 Bli. N. S. 128; *London v. Derry*, 1 Smythe's Ir. Rep. 517.

(*k*) 1 T. R. 401, n.

(*l*) *Wat. C. L.* 172; 3 Keb. 614.

especially those of baptism and sepulture, and the incumbent of which is not removable at the pleasure of the person nominating him (*m*), and attends visitations (*n*); and those which have become so on the augmentation thereof by Queen Anne's Bounty, under the 1 Geo. 1, c. 10 (*o*), and these last have been held to be neither parsonages nor vicarages, within the 21 Hen. 8, c. 13, s. 26 (*p*). The 1 Geo. 1, c. 10, however, merely turns the land into a benefice, and makes the endowment indefeasible (*q*), in order that such curates may be perpetual corporations (*r*). "But," said Lord Denman (*s*), "a perpetual curate appears to be a vicar, for he serves the church in that capacity. *Jenkinson v. Thomas* certainly seems opposed to this view, but the court was there construing a penal statute." In the same case Littledale, J., said, "he is not vicar by name but he is so in effect, and though in fact standing in the place of, cannot be more than a vicar." Williams, J., also said, "he either comes within the denomination of vicar or does not come at all within the enabling words of section 1 of 32 Hen. 8, c. 28." And Coleridge, J., also, said, "the history of the office of perpetual curate shows that he is a kind of vicar performing ministerial duties, and nothing more; and whether or not, when the curacy is augmented by Queen Anne's Bounty, he holds in fee, he has no inheritance in right of his church." In *Mason v. Lambert* (*t*), the court said, a perpetual curate, irremovable at the will of a rector,

(*m*) *Att.-Gen. v. Brereton*, 2 Ves. 425. See also *Perne v. Oldfield*, 2 Chan. Cas. 19; *Price v. Pratt*, Bunb. 273.

(*n*) *Powell v. Milbank*, 1 T. R. 399, n.

(*o*) See *Arthington v. The Bishop of Chester*, 1 H. Bl. 418; *Rez v. The Bishop of Chester*, 1 T. R. 396; *Jones v. Ellis*, 2 You. & Jer. 265; *Doe d. Richardson v. Thomas*, 9 Ad. & E. 556; *Doe*

d. Brammall v. Collinge, 7 C. B. 939.

(*p*) *Jenkinson v. Thomas*, 4 T. R. 665.

(*q*) Per Coleridge, J., 9 Ad. & E. 575.

(*r*) Per Lord Kenyon, C. J., *Jenkinson v. Thomas*, 4 T. R. 665.

(*s*) *Doe d. Richardson v. Thomas*, 9 Ad. & E. 556.

(*t*) 12 Q. B., N. S. 802. See also 2 Ves. 428.

and endowed, cannot be better described than by the general term, *vicarius* (*u*).

Augmented curacies, when benefices presentative.

In relation to the law respecting pluralities of benefices, however, these augmented curacies were made benefices presentative, but not in other respects (*x*), and are so by the subsequent statute on this subject (*y*).

Whether donatives and perpetual curacies within c. 27.

Considering the nature of these preferments, donatives and perpetual curacies, and the authorities here noticed in relation thereto; that a writ of right of advowson, and of *quare impedit*, lies as well *de advocacione capellæ*, including donatives, as *de advocacione ecclesiæ*, which always intends a parsonage (*z*); and that neither the former of these writs, except in certain cases (*a*), nor the latter (*b*), can be now brought; the doubts which have been entertained and removed, respecting the collation to churches by bishops, may be found to be well grounded as respects the collation and the nomination to these preferments also.

Benefices above rectories not within it.

But whether advowsons of donatives and of perpetual curacies be or be not within the c. 27, advowsons of ecclesiastical benefices of a higher grade than rectories are not within the words "other ecclesiastical benefice" there used (*c*). In all the sections, indeed, relating to advowsons, after the first of those sections (*d*), the terms are "ecclesiastical benefice" only. But the context shows that only advowsons of those benefices expressed in such first section are intended.

Usurpation at common law,

At common law usurpation of an advowson displaced the title to it and turned that title into a naked right (*e*).

(*u*) See also 3 Bing. 262.

(*x*) 36 Geo. 3, c. 83, s. 3.

(*y*) 1 & 2 Vict. c. 106.

(*z*) F. N. B. 81 C, 32 H, 31 D.

(*a*) 3 & 4 Will. 4, c. 27, ss. 86, 87, 88.

(*b*) 23 & 24 Vict. c. 126, s. 26.

(*c*) Sect. 30. See *The Archbishop of Canterbury's case*, 2 Co. 46 b; *Lowther v. Lord Radnor*, 8 East, 115; *Doe d. Meyrick v.*

Meyrick, 2 Cr. & J. 223; *Sandiman v. Breach*, 7 B. & C. 97; *Casher v. Holmes*, 2 B. & Ad. 592; *Reg. v. Nerill*, 8 Q. B. 452; *Harrison v. Blackburn*, 17 C. B., N. S. 678; *Reg. v. Cleworth*, 4 Best & S. 927.

(*d*) Sects. 81, 82, 33.

(*e*) Co. Litt. 344 a, b. See *Thompson and Uz. v. The Bishop of Meath*, Ir. Term Rep. 422.

The Statute of Westminster the 2nd (*f*) remedied this, as well in the case of lay as of ecclesiastical advowsons (*g*), and gave writs for the former species. But this statute only remedied some particular cases; therefore, in those not within its provisions, the persons affected by usurpation are as completely barred as at common law (*h*), and does not revest the title, but only gives a possessory remedy to remove, within six calendar months, the incumbent when named in the writ (*i*), or a defendant in a bill in equity, which, in the case of an equitable title, is equivalent to the writ of *quare impedit* sued out at law, and the plaintiff is within this statute (*k*). In the case of lay advowsons this is still so, for they are not within the English statute 7 Anne, c. 18, which, in terms, applied to only the advowson or patronage of any "church, vicarage or other ecclesiastical promotion," or the corresponding statute for Ireland (*l*). By the latter statute the clerk of the patron recovering in *quare impedit* may have against the clerk of the defendant an account of the profits of the benefice (*m*). Advowsons generally, *eo nomine*, indeed, are expressed in section 34 of 3 & 4 Will. 4, c. 27, and after a certain period the same statute (*n*) precludes the bringing of writs of right of advowson and writs of *quare impedit*, and a subsequent statute (*o*) precludes the bringing of the latter writs after the 10th October, 1860.

how remedied,
and where.

As in the statute *De Prærogativa Regis* (*p*), and the Statute of Westminster 2 (*q*), so in the 3 & 4 Will. 4, c. 27, advowsons of churches only are within its provi-

Advowsons of
churches only
within c. 27.

(*f*) 13 Edw. 1, c. 5.

(*g*) Sect. 4.

(*h*) Ir. Term Rep. 424.

(*i*) Co. Litt. 344 b; *Boswell's case*, 6 Rep. 50 a; *Stanhope v. The Bishop of Lincoln*, Hob. 241, 242.

(*k*) *Dowling v. Maguire*, Lloyd & G. 1, 24.

(*l*) 1 Geo. 2, c. 28. See *Thomp-*

son and Ux. v. The Bishop of Meath, Ir. Term Rep. 422.

(*m*) See *Crampton v. The Bishop of Meath*, Sausse & S. Ir. Rep. 227.

(*n*) Sects. 36, 37, 38.

(*o*) 23 & 24 Vict. c. 126, s. 26.

(*p*) *Supra*, p. 322.

(*q*) 13 Edw. 1, c. 5, ss. 1, 2, 3.

sions, and not advowsons of a lay nature, as of hospitals (*r*). The section 34, in terms, extends to advowsons generally, *eo nomine*, and not in the terms used in the three preceding sections. But the context of the statute shows that only advowsons of ecclesiastical benefices are within the section 34, for the only portions of the statute relating to advowsons are the three preceding sections, and they are in terms restricted to benefices of that nature.

Whether advowsons collative within it.

Doubts were entertained whether this statute embraced advowsons of churches when collative. In a case in Ireland before this statute was extended to that part of the United Kingdom (*s*), they were contended to be within it. These doubts, as to these advowsons when belonging to bishops, were removed by a subsequent statute (*t*), which extended the former one to Ireland, as to advowsons generally of ecclesiastical benefices. Some of the terms of the former statute, strictly interpreted, certainly point to advowsons presentative rather than to advowsons collative. But advertent to the terms of the section 30 that no *person* shall recover, &c., and to those of the section 1, that *person* shall extend to a body politic, corporate, or collegiate, the foundation for those doubts was very slight. However, the latter statute extended the former one to such cases, but prospectively only, and not in cases of lapse.

Only inheritance of advowsons of churches within it.—
Not chattel interests.

Only the inheritance, however, of advowsons of churches, and as well collative, since 1843 (*u*), as presentative, is within the 3 & 4 Will. 4, c. 27. Presentments and collations to such advowsons, as interests of a mere chattel nature (*x*), are chattels where the church

(*r*) Co. Litt. 342 a; *Att.-Gen. v. Ewelme Hospital*, 17 Beav. 465. See also *Att.-Gen. v. St. Cross Hospital*, Ib. 485; 7 B. & C. 189; 8 Bing. 502, 512, 551.

(*s*) See *London v. Derry*, 1 Smythe's Ir. Rep. 536.

(*t*) 6 & 7 Vict. c. 54.

(*u*) Ib.

(*x*) See 3 Lev. 47; 4 Leon. 109; F. N. B. 34, n; Co. Litt. 388 a; *Mirehouse v. Rennell*, 3 Bing. 283; 7 B. & C. 113; 8 Bing. 490, *S. C.*

is situated (*y*), and, as before that statute, governed by the Statute of Westminster the 2nd, 13 Edw. 1, c. 5 (*z*), which is a Statute of Limitation (*a*), and as well such interests of an equitable as of a legal nature (*b*).

The presentments of coparceners, when lost by usurpation, are still counted between them and their cotenants, but those whose presentments have been so lost are entitled to present again when their turns, after reckoning such usurpations, arrive again (*c*); and if any of such usurpations have been by any of the other coparceners, the presentments of the latter, when their turns arrive, after reckoning such usurpations, will be unaffected, and may be exercised as if no such usurpations had occurred (*d*).

Presentments
by coparceners.

Whether these chattel interests in advowsons of donatives and of perpetual curacies be within the Statute of Westminster the 2nd, or be subject to the common law in relation to such interests in advowsons presentative, may be a question (*e*). That statute, in terms, applies to only the latter species of advowson. If within that statute, the clerk, after the expiration of six calendar (*f*) months, cannot be removed. If not within it, but subject to the common law in relation to such interests in advowsons presentative (*g*), he cannot be removed from a donative after appointment thereto and possession thereof, or from a perpetual curacy after being nominated thereto and licensed to officiate therein. For the reason which, at common law, was applicable

Whether
chattel in-
terests within
stat. West-
minster 2, or
subject to
common law.

(*y*) Hob. 808.

(*z*) 6 Co. 48 b; 7 Ib. 28 a; Co. Litt. 344 a.

(*a*) See *Boteler v. Allington*, 3 Atk. 453.

(*b*) Ib.; *Gardiner v. Griffith*, 2 P. W. 404. See also *Mutter v. Chauvel*, 1 Mer. 475; 5 Russ. 42; *Dowling v. Maguire*, Lloyd & G. 1, 24.

(*c*) 13 Edw. 1, c. 5; 7 Anne, c. 18.

(*d*) *Pyke v. The Bishop of Bath and Wells and Lindsey*, 4 Bac. & Ab., tit. "Joint Tenants," H. 1; *Richards v. The Earl of Macclesfield*, 7 Sim. 257.

(*e*) See *Mutter v. Chauvel*, 1 Mer. 475; 5 Russ. 42; *Dowling v. Maguire*, Lloyd & G. 1, 24.

(*f*) *Catesby's case*, 6 Rep. 62 a; 2 Inst. 361.

(*g*) Co. Litt. 344 a, b.

in the case of an advowson presentative, and on which, as to these interests, the Statute of Westminster the 2nd was founded, the peace of the church (*h*), is equally applicable to these interests in donatives and perpetual curacies, and *ubi eadem ratio, ibi idem jus* (*i*). That statute also gives to the person deprived of his presentation damages for the loss of it (*h*), but, in terms, in the case of advowsons presentative only. Such damages are now, however, recoverable within only two years after the cause of action or suit (*l*); and by recent statutes (*m*), where damages can be recovered in a writ or action of *quare impedit*, costs also may be recovered. But whether the provision in the Statute of Westminster the 2nd giving damages applies to donatives, perpetual curacies, and lay advowsons, is at least questionable. They might be considered within the equity of that statute. If not within that statute they are not within the recent ones as to costs.

Land and rent
of the church.

As in the Roman law (*n*) the property of the church was not liable to prescription, so by the common law of England, as in the case of property belonging to the Crown (*o*), prior to the statutes 2 & 3 Will. 4, cc. 71 and 100, and 3 & 4 Will. 4, c. 27, the maxim, *nullum tempus occurrit ecclesiæ*, was applied, and, in some cases, still is applicable, to the real property of the established church of this country (*p*). These statutes have abrogated, as to land and rent, that maxim, and have placed such property upon the same foundation as that of laymen (*q*).

Other incor-

Other incorporeal hereditaments to be here noticed

(*h*) Co. Litt. 344 a, b; 3 Atk. 459; 6 Rep. 496.

(*i*) 6 Rep. 50 a; Co. Litt. 10 a.

(*l*) 6 Rep. 51 a.

(*l*) 3 & 4 Will. 4, c. 42, s. 3.

(*m*) 3 & 4 Will. 4, c. 42, s. 34; 4 & 5 Will. 4, c. 39. See *Ed-*

wards v. The Bishop of Exeter, 6 Bing. N. C. 146.

(*n*) C. 1, 2, 23.

(*o*) Vide Book I. Chap. II. Sect. I.

(*p*) See Plowd. 375, 538; 11 Rep. 78.

(*q*) 3 & 4 Will. 4, c. 27, s. 29.

are those which are the subjects of two other statutes passed in the reign of William the Fourth (r). poreal hereditaments.

Rights of common and other profits or benefits law-fully claimable at common law by custom, prescription, or grant from land, *profits à prendre*, are one class of the subjects of the chap. 71. Profits à prendre. 2 & 3 Will. 4, c. 71.

The words "other profit or benefit" in chapter 71 might have included tithes, rent and services, and therefore these subjects are expressly excepted, and, as inheritances, are embraced by the chapter 27 already noticed. Except tithes, rent and services.

Tithes, as a chattel(s), are not within chapter 27, and by section 1 of it moduses or compositions belonging to spiritual or eleemosynary corporations sole are excepted from that chapter, and prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, are the subjects of the chapter 100, and will be presently considered.

Profits or benefits, *profits à prendre*, are of various kinds, as common of pasture (t), of turbary (u), common of estovers—a common which must be claimed for and to be spent in a house only—of piscary, of digging for coals, minerals, and the like (x); a right to the tenth part of all manner of corn growing in a hundred acres of land after the tithes of the parson taken, which is a temporal and not a spiritual right (y); a right of pasture (z); to take the sole and several herbage of land (a); to enter on land and to cut down and carry away the trees and wood growing thereon (b); and to

(r) 2 & 3 Will. 4, cc. 71, 100.

(s) Vide ante, p. 341 et seq.

(t) Co. Litt. 122 a; Warburton v. Parke, 2 Ex., N. S. 64.

(u) Ib. 4 b; 122 a; Touch. 96; Beere v. Fleming, 11 L. T. R., N. S. 49.

(x) Co. Litt. 122 a.

(y) Co. Litt. 159 a. See also Pigot v. Hearn, Cro. El. 599;

Pigot v. Sympton, Ib. 763. But see Knight v. Marquis of Waterford, 15 M. & W. 419.

(z) Bailey v. Appleyard, 3 Nev. & P. 257.

(a) Co. Litt. 122 a. See also Welcome v. Upton, 5 M. & W. 399; 6 Ib. 536.

(b) Bailey v. Stephens, 12 C. B., N. S. 91.

dig for, and take away clay (*i*). All of these, however, may not be within this statute (*h*).

Appendant,
appurtenant or
in gross.

These profits *à prendre* are either appendant or appurtenant to corporeal inheritances (*l*), and claimed by the owners of such inheritances (*m*), or by those claiming a less estate under but in the name of such owners (*n*), and, when claimed by prescription, claimed in a *que* estate, that is, by the claimant and all those whose estate he hath (*o*); or in gross, that is, belonging to a person only (*p*), irrespective of any inheritance, and, when claimed by prescription, are claimed either by a natural person as belonging to him and his ancestors whose heir he is (*q*), or by a corporation as belonging to them and their predecessors (*r*).

What kinds
within c. 71.

The profits *à prendre* within the chapter 71 are those only of the same nature as expressed in the section 1, that is, as a right of common (*s*), and are to be taken (*t*) and enjoyed from or upon land (*u*), and by their nature land only (*x*), and from or upon land of another person (*y*); and, for this purpose, the land of a copyholder, as respect his acts thereon, is not the land of the lord of the manor (*z*).

What not.

But a right to take minerals; a right to a free fishery in gross (*a*); a right to hunt and to hawk (*b*), which does not include the right to shoot (*b*); a right to shoot,

(*i*) *Clayton v. Corby*, 2 Ad. & E., N. S. 813.

(*h*) See *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

(*l*) Co. Litt. 121 b, 122 a.

(*m*) Ib. 121 a.

(*n*) *Gateward's case*, 6 Co. 59 a; Co. Litt. 121 a.

(*o*) Litt. ss. 181, 183; Co. Litt. 121 a; *Welcome v. Upton*, 5 M. & W. 399; 6 Ib. 536; *Ivimey v. Stocker*, 11 Jur., N. S. 775.

(*p*) Co. Litt. 120 b.

(*q*) Litt. ss. 182, 183; Co. Litt. 121 a.

(*r*) Co. Litt. 118 b.

(*s*) See *Welcome v. Upton*, 5 M.

& W. 398; 6 Ib. 536; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

(*t*) See 2 Inst. 411, 412; *Jehu Webb's case*, 8 Co. 46.

(*u*) Sect. 1.

(*x*) Co. Litt. 121 b.

(*y*) *Hammer v. Chance*, 34 L. J., N. S., Eq. 413; 13 W. R. 556, *S. C.*

(*z*) Ib.

(*a*) See *Shuttleworth v. Le Fleming*, *supra*.

(*b*) See *Moore v. The Earl of Plymouth*, 1 J. B. Moo. 346; 7 Taunt. 614, *S. C.*

which is, in general, incident to and arises out of the possession (c), on the ownership of the soil, but may become a distinct incorporeal hereditament, unconnected with such ownership, or in gross (d), although a power to lease the land does not in general contemplate the separation of such an incident from the land, so as to authorize a lease of part of the land with a right to sport over the remainder (e); a right to hawk, hunt, fish, and fowl (f), although capable of being annexed to a manor (g), that is, to the demesnes of it (h), are in some respects profits *à prendre*, but not such profits or benefits to be taken from and upon land as are of the same nature as a right of common, and therefore not within the section 1 of this chapter 71. The creation of these rights, indeed, involves a double operation, a licence to enter upon the land, and a grant of the minerals, fish and other game when obtained and taken (i). The right to hunt, however, does not of itself import the right to the animal when taken (k).

The language of the 2 & 3 Will. 4, c. 71, and of the 2 & 3 Will. 4, c. 100, is materially different; in the one the words are "no claim which may be lawfully made at the common law by custom, prescription, or grant," &c.; in the other the words are "all prescriptions and claims of or for any *modus decimandi*," &c. So that the 2 & 3 Will. 4, c. 71, embraces such claims only as are made by persons who at common law might lawfully have made them, and was never intended to enable persons to take by user a profit *à prendre* (l).

Difference between c. 71 and c. 100.

Common *causa vicinagii* is not strictly and properly Common *causa*

(c) *Dayrell v. Hoare*, 12 Ad. & E. 356.

(d) See *The Overseers of Hilton, &c. v. The Overseers of Bowes, &c.*, 1 L. R., Q. B. 359.

(e) *Dayrell v. Hoare*, supra.

(f) *Wickham v. Hawker*, 7 M. & W. 68.

(g) *Wickham v. Hawker*, supra.

(h) Co. Litt. 122 a.

(i) See Vaugh. 351; 2 B. & C. 197; 13 Mee. & W. 845.

(k) 7 Mee. & W. 79.

(l) Per Alderson, B., *Padwick v. Knight*, 7 Ex. 854, 859.

vicinagii, not within.

a right of common or *profit à prendre* (*m*), and therefore not within the former statute (*n*).

Whether sole and several herbage be.

Whether a claim of sole and several herbage and pasture in gross be a *profit à prendre* within the 2 & 3 Will. 4, c. 71, s. 1, or an interest in the land itself (*o*), and not within that statute, is doubtful (*p*). It is not a right of common (*q*), and, even if claimed as appendant or appurtenant, would seem not to be within the statute (*r*). For the language of the court in pronouncing judgment in the last case leads to the inference that no several and exclusive right is within the 2 & 3 Will. 4, c. 71, s. 1. The first and governing subject of claim referred to is "right of common." This general phrase, which defines no species of common, is no doubt wide enough to include a right of common in gross, as common of pasture; but it is not an apt or proper phrase to designate a several right to the exclusive pasturage of land, or any other several and exclusive right to take any particular profit of land.

Easements.

Definition of.

Easements are the other class of subjects embraced by the 2 & 3 Will. 4, c. 71. An easement has been defined as a service or convenience (*s*), or a privilege (*t*) that one neighbour hath of another by writing or prescription without profit, as a way, a sink, or such like (*u*); and as a right of *accommodation* in another's land, as distinguished from a right which is directly profitable (*x*).

Examples of mere easements.

Thus, a right to turn cattle on the land of another for some specific purpose (*y*); a right for the inha-

(*m*) Vide *supra*, p. 217.

(*n*) See *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; *supra*, p. 152.

(*o*) Co. Litt. 4 a, b.

(*p*) See *Welcome v. Upton*, 5 M. & W. 398; 6 Ib. 536.

(*q*) 6 Ib. 541.

(*r*) See *Shuttleworth v. Le Fleming*, *supra*, p. 152.

(*s*) Cru. Dig., tit. xxxi. ch. i.

s. 16, citing Kitch. Courts, 105 b, but the reference is incorrect.

(*t*) *Termes de la Ley*, tit. Easement, with the same reference; a book of great antiquity and accuracy. Per Bayley, J., 5 B. & C. 229.

(*u*) 3 Hurl. & C. 497.

(*x*) Burt. Comp. pl. 1165. See also Book III. Chap. V.

(*y*) *Bailey v. Appleyard*, 3 Nev. & P. 257.

bitants of a place to go upon a person's land and to pitch their stalls there on market days, without paying anything for the use of the soil (*z*); a right to have fences repaired by the owner of the adjoining land (*a*); to water cattle at a pond, and to take the water thereof for domestic purposes for the more convenient use of a messuage (*b*); to convey water through the land of another, either upon the surface of, or by covered drains in, the land (*c*); to make channels and towing-paths on the lands of another person (*d*); to continue a channel open through the banks of a navigation for conveying waste water to a mill (*e*); to send water over another's land (*f*); to pass in the barge or vessel of another to church or elsewhere (*g*); to pass over land to a brook on the opposite side, and to dam up the brook when necessary so as to force the water into a watercourse running across such land to land contiguous, for watering cattle for the more convenient occupation and enjoyment of the latter land by the occupiers thereof (*h*); to land nets on the soil of another (*i*); to the access of light (*k*); to lay on land dung until it is formed into manure and has become fit to be carried (*l*); are easements.

But a right to hunt and to hawk given to one and the heirs of his body (*m*), or to hawk, hunt, fish and fowl given to one, his heirs and assigns (*n*), and, in each case, to his and their servants, upon and over land, if not strictly a profit *à prendre* (*o*), is more than a mere

Rights not strictly profits, nor mere easements.

(*z*) *Lockwood v. Wood*, 8 Jur. 543, 545; 6 Q. B. 31, S. C.

(*a*) See *Boyle v. Tamlyn*, 6 B. & C. 329, 338.

(*b*) *Manning v. Wasdale*, 5 Ad. & E. 758.

(*c*) *The Governor and Co. of Chelsea Waterworks v. Bowley*, 15 Jur. 1129.

(*d*) *Hollis v. Goldfinch*, 1 B. & C. 205; 1b. 679.

(*e*) *The Earl Portmore v. Bunn*, 1 B. & C. 694.

(*f*) 19 C. B., N. S. 758.

(*g*) 8 Co. 46 b.

(*h*) *Beeston v. Weate*, 5 Ell. & Bl. 986.

(*i*) *Gray v. Bond*, 2 Brod. & B. 667. See also *Shuttleworth v. Fleming*, 19 C. B., N. S. 687.

(*k*) See 10 C. B., N. S. 286, 288.

(*l*) *Pye v. Mumford*, 5 Dow. & L. 414.

(*m*) *Moore v. The Earl of Plymouth*, 1 J. B. Moore, 846; 7 Taunt. 614, S. C.

(*n*) *Wickham v. Hawker*, 7 M. & W. 63.

(*o*) Vide supra, p. 363.

easement, and would seem to be a tenement within the statute *De donis* (*p*), as, at least, concerning land (*q*).

Appurtenant,
or in gross,
and how
claimed.

Easements also, like profits à prendre, may be either appurtenant (*r*) or in gross (*s*), and may be claimed, not only by custom (*t*) or by prescription, or by grant, but by mere user founded on a grant presumed from such user but alleged to be lost or destroyed (*u*), except perhaps when claimed against the Crown (*v*).

Cesser of.

When an easement is granted for a particular purpose, and that purpose is at an end, the easement also ceases to exist (*w*).

Easements
within c. 71.

The easements specified in the 2 & 3 Will. 4, c. 71, are ways and other easements, watercourses, the use of water (*x*), and the access and use of light (*y*). The easement way requires no particular notice here (*z*).

Watercourses.

The easement of a watercourse may, in itself, embrace both the right to the use of the channel for conveying the water, and also the right to the water itself, or to the mere use of the water flowing or conveyed along or by the channel (*a*). But in this statute, a watercourse, and the mere use of water, are treated as distinct easements.

The right of sending dirty water into a watercourse is a watercourse within the section 2 (*b*).

So, although there be no right to water itself, a right,

(*p*) 13 Edw. 1, c. 1.

(*q*) Co. Litt. 19 b, 20 a; *Moore v. The Earl of Plymouth*, supra.

(*r*) Com. Dig., Voc. Chimin, D., 2; 2 Salk. 562; 6 Mod. 4.

(*s*) 1 Bos. & P. 371; Willes, 282, 287.

(*t*) 6 Rep. 60; Co. Litt. 110 b.

(*u*) See *Hendy v. Sterenson*, 10 East, 55; *Read v. Brockman*, 8 T. R. 151; *Bailey v. Stephens*, 10 C. B. 91; Best on Ev., sect. 379.

(*v*) Vide ante, pp. 122, 124. But see 3 T. R. 151.

(*w*) See *National Guaranteed Manure Co. v. Donald*, 4 Ex., N. S. 8.

(*x*) Sect. 2.

(*y*) Sect. 3.

(*z*) See, however, *Bright v. Walker*, 4 Tyrw. 502; *Onley v. Gardiner*, 4 M. & W. 496; *Parker v. Mitchell*, 11 Ad. & E. 788; *Lawson v. Langley*, 4 Ib. 890; *Tickle v. Bromne*, Ib. 369; *Kinloch v. Neville*, 6 M. & W. 795; *Beasley v. Clark*, 2 Bing., N. C. 705; *England v. Wall*, 10 M. & W. 699; *Holford v. Hankinson*, 8 Jur. 463; *Pack v. Skinner*, 18 Q. B., N. S. 568; *Winship v. Hudspeth*, 10 Ex. 5; *Lowe v. Carpenter*, 15 Jur. 883, on this statute.

(*a*) See *Itimney v. Stooker*, 12 Jur., N. S. 419.

(*b*) *Wright v. Williams*, 1 M. & W. 77.

if it come or be sent, to have it come or sent without pollution (*c*), would be such a watercourse; and polluting water is a species of injury differing from that of abstracting the water itself (*d*), for which injury the owner of the right may maintain, against a mere wrongdoer, an action (*e*), or a suit for an injunction to restrain the pollution (*f*).

Where the occupier of the servient tenement is himself also entitled to use the water, that use of it on such tenement, regard being had to the acts done in the enjoyment, in respect of it, of the easement, does not take away from the effect of the use of it for the dominant tenement (*g*).

Riparian rights are derived entirely from the possession of land abutting on the river, and a riparian proprietor cannot retain such land and at the same time transfer those rights or any of them, and they cannot be acquired by the grantee of land not so abutting, by virtue merely of his occupation, but only by express grant from such proprietor, and the grantee cannot sue in his own name for any infringement of the rights so granted (*h*).

The easement of the use of water may be of water flowing from a natural source through or along as well as an artificial (*i*) and permanent, as distinguished from a mere temporary channel (*k*), as a natural channel (*l*);

(*c*) 2 Ex., N. S. 486.

(*d*) *Wood v. Waugh*, 3 Ex. 748; *Whaley v. Laing*, 2 Ex., N. S. 476; *S. C.*, in error, 3 Ib. 675; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 320.

(*e*) *Mayor v. Chadwick*, 11 Ad. & E. 571; *Whaley v. Laing*, *supra*.

(*f*) *Goldsmid v. The Tunbridge Wells Improvement Commissioners*, 14 W. R. 92; 13 L. T., N. S. 862; *S. C.* 562, on appeal.

(*g*) *Beeston v. Weats*, 5 Ell. & Bl. 986.

(*h*) See *Stockport Waterworks*

Co. v. Potter, 3 Hurl. & C. 320—Bramwell, B., diss.

(*i*) *Beeston v. Weats*, 5 Ell. & B. 986.

(*k*) *Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Waugh*, 3 Ex. 748; *Greatrex v. Hayward*, 8 Ib. 291; *Ivimey v. Stocker*, 11 Jur., N. S. 775; *Gaved v. Martyn*, 19 C. B., N. S. 732; *Broadbent v. Ramsbotham*, 11 Ex. 611.

(*l*) *Mason v. Hill*, 5 B. & Ad. 1; 2 Nev. & M. 347; 3 B. & Ad. 304; *Embery v. Owen*, 6 Ex. 353.

Riparian rights.

The use of water.

and where the water is obtained from a natural source and flows through or along an artificial cut (*m*), and not where the water is obtained artificially by the owner of the servient tenement (*n*), and as well when the water is subterraneous and flows in a known and definite channel as when superficial and so flowing (*o*), but not where the water merely percolates through the strata of the earth in no known channels (*p*). In short, as respects artificial waters of an ordinary character the purpose for which they have been collected is to be regarded in determining whether rights or interests have been or can be acquired in them by other persons than those who collected them.

Of water of
canals.

But the water of canals, so far as respects the capacity of other persons to acquire a right and interest in them, stands upon a different footing both from waters flowing in their natural course, and from artificial waters of an ordinary character. For the persons claiming rights in the water of a canal have to meet, not only the difficulty arising from the special purpose for which the water has been collected, but the difficulty arising from the water having been devoted by the legislature to that special purpose. To such water, therefore, the rule just noticed appears to apply with greater force than to artificial waters of an ordinary character (*q*).

Easements not
within c. 71.

But notwithstanding the words "or other easement" in the section 2 of this statute, not every sort of enjoyment which may be classed under the general term easement is within this statute; as a claim to the free passage of air over the land of another person (*r*); or

(*m*) *Beeston v. Weate*, supra. See also *Irimy v. Stocker*, 12 Jur., N. S. 419.

(*n*) *Arkwright v. Gell*, *Wood v. Waugh*, *Greatrex v. Hayward*, supra.

(*o*) *Wood v. Waugh*, supra.

(*p*) *Chasemore v. Richards*, 7

H. of L. Cas. 349.

(*q*) *The Staffordshire and Worcestershire Canal Co. v. The Birmingham Canal Co.*, 13 W. R. 358; 11 Jur., N. S. 71; 11 L. T. R., N. S. 647.

(*r*) *Webb v. Bird*, 10 C. B., N. S. 268.

customs for mere pleasure, recreation and amusement, as to enter on land to enjoy rural sports (*u*), to dance upon a green (*x*), to hold horse races (*y*), and the like. The statute embraces those rights only which consist of something to be exercised upon or over the soil of the adjoining owner, analogous to a right of way, or a right of watercourse (*z*), and are rights of utility and benefit incident and annexed to property for its more beneficial and profitable enjoyment (*a*), and capable of interruption; and has been hitherto confined to rights in their nature of a perpetual and permanent character, and the ownership of which is in fee simple (*b*).

The section 2 also points to a right belonging to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross wholly irrespective of land (*c*).

A pew, or rather the right of sitting in a pew, in a church, is said to be an easement (*d*). This right, however, strictly speaking, is not within either of the definitions given above (*e*) of an easement, and cannot be said to be claimed as accessory to a tenement and upon another tenement (*f*); for although the right must be claimed in respect of a house (*g*), and the house may be regarded, in some sense, as a dominant tenement, yet neither the church nor the pew in it, independent of the right of sitting in the pew, can be considered as a servient tenement. The right is, at

(*u*) *Millechamp v. Johnson*, Willes, 205, n. (b).

(*x*) *Abbott v. Weekly*, 1 Lev. 176.

(*y*) 6 M. & W. 542; *Mounsey v. Ismay*, 3 Hurl. & C. 486; 3 B. & C. 340; *Arkwright v. Gell*, 5 M. & W. 203; *Chasemore v. Richards*, 7 H. of L. Cas. 349; 10 C. B., N. S. 282.

(*z*) 10 C. B., N. S. 268; 3 Hurl. & C. 486.

(*a*) *Mounsey v. Ismay*, 3 Hurl. & C. 486.

(*b*) *Solomon v. The Vintners' Co.*, 4 Ex., N. S. 586.

(*c*) 3 Hurl. & C. 497.

(*d*) See Gale on Easements, who cites Best on Presumptions, who cites 3 Stark. Ev., tit. Pew, 861, 3rd Edit.

(*e*) Vide ante, pp. 230, 364.

(*f*) Vide Gale on Easements, 1, 9 et seq.

(*g*) Co. Litt. 121 b, 122 a; *Byerley v. Windus*, 5 B. & C. 1; 1 Phill. 325; 8 Add. 6; ante, pp. 130, 131.

most, and seems to have been considered by the courts (*h*), *quasi* an easement, or an easement . . . operating as a licence, but is neither a tenement nor an office, nor a *profit à prendre* (*i*); and conveyed in terms to create a fee simple estate, and although of the annual value of forty shillings and upwards, does not confer the elective franchise (*j*).

But this right, even if it were an easement, is not an easement within the 2 & 3 Will. 4, c. 71. For an easement within the section 2 must be one analogous to a right of way, which precedes the term easement, and to a right of watercourse, which follows that term,—something that is to be exercised upon or over the soil of the adjoining owner (*k*); and that section refers to easements properly so called, and in some way appurtenant to a dominant tenement (*l*), which implies the correlative, a servient tenement (*m*).

Right to support from adjoining land.

The right to support from adjoining land is not a natural right (*n*), but is merely an incident to the ordinary enjoyment of the land having such support, and not, in any sense, an easement (*o*), and not within this statute (*p*).

Easements as to buildings.

The ways or other easements, watercourses and the use of water are also to be upon, over or from *land*; but in this case not necessarily land only, which term, as to them, may extend to houses or buildings generally (*q*).

No distinction between easements acquired by grant and those acquired by long enjoyment.

This statute makes no distinction between easements acquired by grant, and those acquired by long enjoyment.

(*h*) See 5 B. & Ald. 356; 8 B. & C. 294.

(*i*) Per Byles, J., *Hinde v. Chorlton*, 15 L. T. R., N. S. 472.

(*j*) *S. C.*

(*k*) 10 C. B., N. S. 286.

(*l*) *Mounsey v. Iremay*, 3 Hurl. & C. 486; *Bailey v. Stephens*, 12 C. B., N. S. 91; *Shuttleworth v. Le Fleming*, 19 Ib. 687.

(*m*) See 19 C. B., N. S. 696.

(*n*) *Solomon v. The Vintners' Co.*, 4 Ex., N. S. 585.

(*o*) *Baokhouse v. Bonomi*, 9 H. of L. Cas. 503. See also *Richards v. Harper*, 1 L. R., Ex. 199.

(*p*) *Solomon v. The Vintners' Co.*, *supra*.

(*q*) Sect. 2; Co. Litt. 4 a.

ment; and as before the act the former might have been presumed from the latter, and as the act has substituted fixed periods of enjoyment for such presumption, the enjoyment of an easement for the requisite period is legalized not only between the immediate parties, but as between the claimant and all other persons (*r*). quired by grant and those acquired by enjoyment.

Since the 2 & 3 Will. 4, c. 71, all easements claimed by virtue of it, except light (*s*), to be valid against any person, must be valid against all who have any estate in the land (*t*). Must be valid against all persons having any estate in the land.

Both profits *à prendre* and easements, when claimed as an accessory to a tenement (*u*), cannot in general (*v*), but sometimes may (*x*), be claimed as an accessory to a thing of the same nature and quality. But the true test seems to be the propriety of relation between the *principal* and the *adjunct*, or in other words whether they so agree in nature and quality as to unite without incongruity (*y*). Profits and easements as accessories

The profits *à prendre*, and the easements within the 2 & 3 Will. 4, c. 71, must be connected with the enjoyment of a dominant tenement, have some natural connection with it, as being for its benefit, or inhere in the estate, be capable of being annexed to land, and of the ordinary and usual kind (*z*). —to a dominant tenement,

The profits *à prendre* and the easements within the 2 & 3 Will. 4, c. 71, when claimed by prescription, must be claimed in respect of some *tenement* (*a*), and may be in respect of land in which the claimant and other per- —and not in gross.

(*r*) *Rolle v. White*, 16 W. R. 593; 8 B. & S. 116.

(*s*) *Fremmen v. Phillips*, 7 Jur., N. S. 1246; 11 C. B., N. S. 449.

(*t*) *Bright v. Walker*, 1 C. M. & R. 220; *Monmouth Canal Co. v. Harford*, Ib. 614; *Wilson v. Stanley*, 12 Ir. L. Rep., N. S. 345.

(*u*) 21 Edw. 3, 2, pl. 5; Bract. Lib. 4, fo. 220; Gale on Easements, p. 8.

(*v*) Co. Litt. 121 b. See also *Mill v. The Commissioner of the*

New Forest, 18 C. B. 60.

(*x*) Co. Litt. 120 b.

(*y*) Co. Litt. 121 b, n. 7; 1 Ventr. 386.

(*z*) *Keppell v. Bailey*, 2 Myl. & K. 517, 535; *Hill v. Tupper*, 2 Hurl. & C. 121; *The Stockport Waterworks Co. v. Potter*, 3 Ib. 300; *Ashroyd v. Smith*, 10 C. B. 164; *Bailey v. Stephens*, 12 Ib. 91.

(*a*) Vide sect. 5; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

sons have an interest *alternis vicibus* (*b*). This term tenement is of larger import than the term land, and although in the more comprehensive sense embracing such profits or benefits themselves (*c*), yet as here used does not embrace them, for, generally, they must be claimed for or annexed to only corporeal inheritance (*d*), and land cannot be claimed as appurtenant to land (*e*); and for this purpose mines, as a part of the land (*f*), as distinguished from the mere right to get them (*g*), are land. Therefore profits *à prendre* and easements, when claimed by prescription and in gross, are not within the statute in question and cannot be sustained by virtue of it (*h*).

And claimable
at common
law, by cus-
tom, pre-
scription, or
grant;

(except as
to light,)

—and claimed
as of right.

The profits *à prendre*, and also the easements, within this statute, except the access and use of light, must be such as may be lawfully claimed at the common law, by custom, prescription or grant (*i*); and unless they can be so claimed they cannot be sustained (*j*). Claims to the access and use of light are not subject to such qualification, but when enjoyed for the period assigned, without an express consent in writing, become absolute (*k*), and against all persons, although commencing against one having only a partial interest (*l*).

When the user of the profit *à prendre*, or easement claimed by prescription, is not claimed as of right (*m*),

(*b*) Co. Litt. 4 a.

(*c*) Ib. 6 a

(*d*) Ib. 121 a, b, 122 a; *Mill v. The Commissioner of the New Forest*, 18 C. B. 60; 2 Jur., N. S. 520, 525; L. J., N. S. 215; 4 W. R. 509, S. C.

(*e*) 1 Vent. 886; *Att.-Gen. v. The Corporation of London*, 12 Beav. 8; *Wilkinson v. Proud*, 11 M. & W. 33; *Lister v. Pickford*, 18 W. R. 827.

(*f*) *Wilkinson v. Proud*, supra.

(*g*) Co. Litt. 122 a; vide ante, pp. 337, 338.

(*h*) *Bailey v. Stephens*, 12 C. B., N. S. 91; *Mounsey v. Imay*, 3 Hurl. & C. 486; *Shuttleworth v.*

Le Fleming, 19 C. B., N. S. 687.

(*i*) Sects. 1, 2.

(*j*) *Clayton v. Corby*, 5 Q. B. 415. See also *Att.-Gen. v. Mathias*, 4 Jur., N. S. 630; *Bailey v. Stephens*, 12 C. B., N. S. 90.

(*k*) Sect. 3.

(*l*) *Simper v. Foley*, 2 John. & H. 555. See also *Frewen v. Phillips*, 11 C. B., N. S. 449.

(*m*) Sect. 5; *Bright v. Walker*, 4 Tyrw. 502; *Onley v. Gardiner*, 4 M. & W. 496; *Arkwright v. Gell*, 5 Ib. 208; *Tickle v. Brown*, 4 Ad. & E. 369; 14 W. R. 64; *Holford v. Hankinson*, 8 Jur. 463; *Winship v. Hudspeth*, 10 Ex. 5; *Warburton v. Parke*, 2 Ib., N. S. 64.

but originates by the permission of the tenant or of the owner of the servient tenement, or of both of them, no right to the profit or the easement is acquired (*n*).

The access and use of light is to be to and for any dwelling-house, workshop or other building (*o*), and is an absolute indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used (*p*). Before the statute an open peaceable enjoyment for at least twenty years was necessary to be shown, but no absolute period was fixed. The statute has made no alteration in the quality of the enjoyment, but has only fixed the period of it absolutely for that period (*q*).

Prescriptions and claims of or for any *modus decimandi*, and of or to any exemption from or discharge of tithes, are the subjects to which the 2 & 3 Will. 4, c. 100, is applied.

Moduses, exemptions from tithe.

2 & 3 Will. 4, c. 100, what within the act.

This statute has been said to apply to moduses, compositions real and the like (*r*), and, in effect, to describe the sort of modus or exemption it means to aid (*s*). Neither moduses in lieu of, nor exemptions from, nor discharges of tithes, however, but only prescriptions and claims to be free from the liability to render or to pay tithes in kind by reason of the payment of a modus in lieu thereof, or by reason of being exempted from or discharged of them, either entirely, or by composition for them (*t*), are the direct objects of this enactment, which was made in ease of the *occupier*, who had not paid tithe in kind at all, but had been totally exempt, or had paid something in lieu of it for a long period, and

(*n*) *Beeston v. Weats*, 5 Ell. & B. 986; *Gaved v. Martyn*, 19 C. B., N. S. 732; *The Staffordshire and Worcestershire Canal Co. v. The Birmingham Canal Co.*, 13 W. R. 358; 11 Jur., N. S. 71; 11 L. T. R., N. S. 647; *Wilson v. Stanley*, 12 Ir. L. Rep., N. S. 345.

(*o*) Sect. 3.

(*p*) 1 L. R., L. C. 298.

(*q*) *Lanfranchi v. Mackenzie*, 36 L. J., Ch. 518.

(*r*) 2 De G., M. & G. 469.

(*s*) 1 Hare, 208.

(*t*) 1 M. & G. 267.

effects this by providing a limitation to protect the terretenant in his prescriptive mode of rendering their tithes to the clergyman or tithe holder (*u*); and these prescriptions and claims being established under the conditions imposed by the enactment, the claim to the payment or render of tithes in kind is barred or excluded, and thus, in effect, the statute may be said to extend to tithes, not however as an inheritance (*x*), but as a chattel only (*y*). For the acts of parliament then in existence had already provided sufficient remedies for the tithe owners as against the tithe payer, and the time of six years had been limited within which arrears could be recovered; and this statute, although before it came into operation the 3 & 4 Will. 4, c. 27 was passed, was not affected by this latter chapter (*z*).

Moduses and exemptions on the same footing.

Although prescriptions and claims to moduses, and exemptions from or discharges of tithes, are, by this statute, placed on the same footing, yet, as these moduses and exemptions or discharges differ, a consideration of them separately will show more clearly the operation of the act upon these prescriptions and claims.

Modus, as distinguished from composition.

Moduses, although probably originating in (*a*), are distinguished from, compositions properly so called. The former are claimed by prescription (*b*); the latter are claimed under instruments made before the disabling statutes, and are to be proved by the production of the instruments themselves, or of such evidence as will be sufficient to raise the presumption that they have existed (*c*).

Modus, what is.

A *modus decimandi* is when lands, tenements or

(*u*) 15 M. & W. 419, 617; 17 Q. B. 538.

(*x*) Vide supra, p. 342; 15 M. & W. 419.

(*y*) 15 M. & W. 617; 2 De Gex, M. & G. 469.

(*z*) *Dean of Ely v. Bliss*, 2 De Gex, M. & G. 469.

(*a*) *Chapman v. Monson*, 2 P. W. 573.

(*b*) See 4 Q. B., N. S. 351.

(*c*) *Haws v. Swaine*, 2 Cox, 179; *Chatfield v. Fryer*, 1 Pri. 256; *Heathcote v. Mainwaring*, 3 B. C. C. 217; 4 Q. B., N. S. 324, 337, 338; 2 Ex. 274, 276.

hereditaments have been given to the parson and his successors, or an annual certain sum or other profit always, time out of mind, to the parson and his successors, in full satisfaction and discharge of all the tithes in kind in such a place (*d*), and this is the only meaning of the term *modus* in the 2 & 3 Will. 4, c. 100 (*e*).

A *modus* assumes a contract that the land shall be free from all tithes in consideration of the *modus* (*f*), and is inconsistent with the receipt of tithes in kind by any one (*g*); and therefore although a sum set up as a *modus* and proved to be paid to the parson, yet if the tithes in fact be shown to be in, and to have been received by, another person, such sum cannot be sustained as a *modus* (*h*). What is not.

The prescription or claim, in the case of a *modus*, is to be of a *modus decimandi*, possessing all the essential requisites of, and being such a payment as may be reasonably considered as such a *modus* (*i*), and as of right (*k*). But whether a prescription or claim to a *modus decimandi* possessing all those requisites and being such a payment, but liable to objections which, before this statute, would have affected the validity of such a payment, as, for instance, rankness, or that the titheable matters covered by the *modus* have been introduced within the time of legal memory, can be sustained, is a question which has produced a diversity of judicial opinion. Effect of the act on those invalid before it.

In *Salkeld v. Johnson* (*l*), Wigram, V.-C., said, can it have been intended that a *modus*, bad upon the face of it, as desultory, uncertain, or otherwise invalid in law before the act, should be made valid by the operation of the act? The question must be answered in the

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| (<i>d</i>) 13 Rep. 40. | (<i>h</i>) <i>Knight v. Marquis of Waterford</i> , 4 You. & Coll., Ex. 283. |
| (<i>e</i>) 15 M. & W. 426; 2 C. B. 776. | (<i>i</i>) 2 C. B. 767, 776. |
| (<i>f</i>) 1 M. & G. 271. | (<i>k</i>) 2 Ex. 282, 286. |
| (<i>g</i>) 4 You. & Coll. Ex. 327. | (<i>l</i>) 1 Hare, 196, 208. |

negative ; for the act only professes to aid the proof of a modus, and not to make good a modus which, before the act, was invalid. It refers to the modus to be established as something known to the law. In *Fel-lowes v. Clay* (*m*), Patteson, J., said, the act is wholly silent as to rankness in, or other objection in law to, a modus, and leaves any question of rankness or other objection in law untouched, and Denman, C. J., also said, that a modus bad on the face of it is no modus, and cannot be set up under that name. Rankness would render it bad, and it would be disproved by proof of payment of tithe in kind within the time of legal memory. In *Young v. Clare Hall* (*n*), Patteson, J., also said that when a payment is set up as a modus in discharge of tithes, the defendant must show what might be a modus at common law ; for the statute 2 & 3 Will. 4, c. 100, only alters the period and makes it no longer necessary to prove the payment of the modus from time immemorial ; and in *Salkeld v. Johnson* (*o*), Tindal, C. J. and Cresswell, J., said that nothing more is effected than the shortening of the time required for the valid establishment of the claim in each respective case, and leaves all other proof necessary, as it was before.

On the other hand Lord Cottenham, C., in *Salkeld v. Johnson* (*p*), on appeal from the decision of Wigram, V.-C., adverting to the opinion of Tindal, C. J. and Cresswell, J., just noticed, said that the supposition that time was the only essential intended to be dealt with by the act, was a supposition contrary to the expressed terms of the act and inconsistent with the legal state of the interests upon which it was to operate. Suppose, said his lordship, a payment claimed as a modus proved to have been paid during the period required by the

(*m*) 4 Q. B. 313.
 (*n*) 17 Q. B. 529.

(*o*) 2 C. B. 757.
 (*p*) 1 M. & G. 242.

act, could the plaintiff be permitted to show that such payment could not have had a legal origin by reason of its rankness? If such proof could be made, and it were to be admitted, the whole object of the act as to moduses would be defeated; and if it could not be admitted, then the act has made a *modus* good which before the act was invalid. In the same case in the Court of Common Pleas (g), Coltman, J., said, that it was clearly the intention of the act to remove some, at least, of the objections which, at the time when the act was passed, were valid objections to the validity of a *modus*. For instance, all objections founded on the score of rankness, or on the ground that the articles covered by the *modus* have been introduced within the time of legal memory. It may, perhaps, not necessarily follow that every payment which has been made for the limited number of years, under the name of a *modus*, must be considered as valid, if it be deficient in those essential requisites which are necessary to constitute a *modus*; for it is a *modus decimandi* which the act professes to deal with; and it may, with some reason, be contended, that the act applies only to such payment as may reasonably be considered as a *modus*; for a *modus decimandi* being a payment in lieu of tithes, unless the payment be made for the benefit of the person to whom the *decimæ* are due, it may be fairly argued not to be a *modus decimandi*, and so not within the purview of the statute, or entitled to its protection. He also remarked that some questions of nicety and difficulty should arise in determining whether a particular payment should be considered as showing the existence of a *modus decimandi*, within the meaning of the statute, is what might be expected. It appears from the 7th section that the act contemplates the possibility that matter of law may be set up in answer to a plea which sets up the actual payment of

an alleged *modus* for the specified number of years. Erle, J., also said that whether every payment made in the name of a *modus* is to be considered as made in respect of a *modus decimandi*, within the purview and protection of the statute, may be a question in some cases; and the Court of Exchequer in the same case (*r*) said that rankness is no longer an objection to a *modus*. Rankness indeed is not, strictly speaking, an objection in point of law to it, but a mere question of fact (*s*), a mere rule of evidence (*t*), and always was, in truth, merely evidence against the presumption of immemorial payment (*u*).

A prescription or claim to a *modus* in lieu of tithes of matters which have arisen or have been introduced within the time of legal memory, may be sustained under this statute (*v*).

A *modus* properly so called, which before the statute was open to objection on the grounds just noticed but good in other respects, and since the statute paid for the period prescribed by it, and either for all tithes, or only some particular tithes (*x*), is a valid *modus* within the statute (*y*). So a composition made in modern times and acted upon for the full statutory period and not proved to have been made by agreement in writing (*z*), and a sum paid annually for tithes, being a certain compensation to the parson, and paid and reserved as of right for that period, although the payment commenced in the year 1653 (*a*), become valid *moduses* within the statute.

What *modus*
not within the
act.

But a prescriptive title to a parcel of tithes, and a prescriptive rent for them, is neither a *modus decimandi*

(*r*) 2 Ex. 277.

(*s*) 4 You. & Coll. Ex. 329.

(*t*) 2 Bl. Com. 80.

(*u*) 2 Ex. 277.

(*v*) See *Salkeld v. Johnson*, 1 Hare, 210; 2 Ex. 256; 1 M. & G. 271, *S. C.*

(*w*) See 2 Ex. 288.

(*y*) See *Salkeld v. Johnson*, 1 M. & G. 267; 2 Ex. 256; 2 Com. B. 749—per Coltman and Erle, JJ., but Tindal, C. J., and Cresswell, J., contra, *S. C.*

(*z*) See *S. C.*, 2 Ex. 256.

(*a*) *Twymdes v. Brown*, 8 Ex. 117.

nor an exemption or discharge from tithes within this statute (b).

The claim to what, in the case of *Knight v. Marquis of Waterford*, was considered as the parcel of tithes, was not, in terms, to tithes as such, but to a tenth part of all titheable matters, and yet was considered as a claim to the tithes as such. In *Pigot v. Hearn* (c), however, a similar claim was considered as a temporal right and distinct from tithes as such and a spiritual one; Lord Coke also (d) made the same distinction. The only difference between the principal case and that in *Croke*, and the one put by Lord Coke, is, that in the principal case the claim was to a tenth of all titheable matters, but in the case in *Croke*, and that put by Lord Coke, the claim was to a tenth of only some titheable matters; and in the last case was of those from a given quantity of land, and after the tithes of the parson taken, marking more precisely the distinction between tenths and tithes as such. The case of *Pigot v. Hearn* appears to be the same as *Pigot v. Sympson* (e), and Lord Coke states (f) the claim in it as being to the tithes as such; and the Court of Exchequer on both sides of the court (g), and also the House of Lords (h)—where, however, the case put by Lord Coke, in his commentary, was not cited—considered the claim in the principal case as one to the tithes as such, and that in *Pigot v. Sympson*, and Lord Coke's statement of it, the prescription was treated as giving the lord a title, by the special matter, to the tithes as such, as appurtenant to his manor, with a right to sue for them in the spiritual court, and thought that was the true principle of those decisions. In the principal case, also, the

(b) *Knight v. Marquis of Waterford*, 15 M. & W. 419; 4 You. & C. 328; 11 Cl. & F. 658.

(c) Cro. El. 599.

(d) Co. Litt. 159 a.

(e) Cro. El. 768.

(f) *Bishop of Winchester's case*, 2 Rep. 42.

(g) 15 M. & W. 419; 4 You. & Coll. 328.

(h) 11 Cl. & F. 658.

prescription was for the lord of the manor and his assigns of the tithes, and the Court of Exchequer and the House of Lords doubted the validity of such a prescription; for, if valid, the right of taking the tithes would be assignable by one layman to another and would make a layman capable of tithes in gross (*i*).

An annual payment in respect of tithes and glebe, although paid for the full statutory period, is not a *modus decimandi*, nor indeed a discharge of any kind, for there can be no *modus* for the rent of land (*k*). Whether on an alienation, before the enabling statute, of glebe and tithes, in exchange for one annual payment to be made in lieu of both glebe and tithes, such payment, without showing how much of it was in respect of the glebe and how much in respect of the tithes, would be a *modus* in discharge of tithes, might be difficult to maintain (*l*).

Exemptions
from tithes.

The other prescriptions and claims within the 2 & 3 Will. 4, c. 100, are those for exemptions from and discharges of tithes. Before this statute, a prescription or claim *de non decimando* by the Crown and by the clergy was valid, and also, but only through them, by the laity (*m*). This statute has given to the laity a substantive and independent right to a species of prescription *in non decimando*, and enabled them to establish that right by proof of the prescription for a shorter period than would have been required by the common law, if such a prescription had been valid (*n*).

By composition before
and since the disabling
statutes.

A prescription or claim to be discharged of tithes was, before this statute, generally by composition properly so called (*o*), and sometimes also, since the disen-

(*i*) 4 You. & Col. 328.

(*k*) *Young v. Clare Hall*, 17 Q. B. 529.

(*l*) Per Lord Denman, C. J., 17 Q. B. 538.

(*m*) See *The Bishop of Winchester's case*, 2 Rep. 43; Hob.

295, 306; Cro. El. 206, 599; 3 Burr. 1273; 11 Price, 126; 2 Bl. Com. 81; 2 Ex. 273, 274.

(*n*) See *Salkeld v. Johnson*, 2 Ex. 256, 285.

(*o*) Vide sup. p. 374.

abling statutes, by agreement for that purpose, which, however, although absolutely void, were often, but erroneously, confirmed by the Court of Chancery (*p*), but not, it has been said, since 1765; and that, even if they have, they are by the statute in question placed on the same footing as those made and confirmed before that year (*q*).

These compositions so made and confirmed since the disabling statutes, and made and acted upon, and not the subject of any action or suit, at the time, or within one year next before the time of the passing of the statute in question, are by it made valid (*r*); and such a composition not made by agreement in writing, but acted upon for the full statutory period, would now be, either as a modus or a composition, within this statute, and a valid defence to a claim to the render of tithes in kind (*s*). But if made in writing and not so confirmed, although acted upon for such period, would not be a valid composition within this statute (*t*). The construction of the section 2 of this statute has become, since the Tithe Commutation Act (*u*), immaterial for every purpose (*x*).

Those since such statutes made valid.

Compositions when,

—and when not valid within this act.

The mere nonpayment of tithes for the statutory period, without showing any ground of discharge or exemption recognized by law before the act passed (*y*), which the proof of nonpayment given under the statute was to validate, and although the titheable matters have been introduced within time of legal memory (*z*), is sufficient to support a claim to exemption of a part

Exemption supported by mere non-payment of tithes.

(*p*) *Att.-Gen. v. Cholmondeley*, 2 Ed. 304; 3 B. P. C. 332; Amb. 510. See also *Thorpe v. Mattingley*, 5 M. & W. 421; 2 You. & Col. 421; *Thorpe v. Plowden*, 14 M. & W. 528; *Plowden v. Thorpe*, 7 Cl. & F. 137; 2 Ex. 274.

(*q*) 2 Ex. 284.

(*r*) Sects. 1, 2, 3; *Thorpe v.*

Mattingley, Thorpe v. Plowden, supra.

(*s*) See *Salkeld v. Johnson*, 2 Ex. 256.

(*t*) *Ib.*

(*u*) 6 & 7 Will. 4, c. 71.

(*x*) 2 Ex. 281.

(*y*) See 2 Bl. Com. 81.

(*z*) *Salkeld v. Johnson*, 1 M. & G. 242.

of a parish from the payment of all tithes to the rector of the parish (*a*).

Nature of the enjoyment as a discharge may qualify the right.

To sustain the exemption or discharge nothing more is required than the enjoyment of the land producing titheable matters and of right, without the payment or the render of or any equivalent for the tithes during the prescribed period; and as the statute applies only to those cases in which the enjoyment has been adverse and of right, the nature of the enjoyment would qualify the right (*b*).

By whom and for what the exemption may be claimed.

The exemption or discharge may be claimed by a lay occupier of the land against an ecclesiastical person, and as well in respect of particular titheable matters (*c*), as of all tithes (*d*). Lord Cottenham, C., appears to have been of opinion that both descriptions of claim were equally within the true meaning of the word "tithes," as used in the statute (*e*).

The ground of it.

The ground of the exemption or discharge may be either by composition real, or otherwise. In *Salkeld v. Johnston* (*f*), Wigram, V.-C., said, composition real is put as an example. The words "or otherwise" must mean other legal causes. The legislature could not have intended under those general words to create new causes for modus or exemption before unknown to the law; and Coleridge and Patteson, JJ., in *Fellowes v. Clay* (*g*), were of the same opinion, but Lord Denman, C. J., and Williams, J., in the same case, and Lord Cottenham, C., in *Salkeld v. Johnston*, on appeal from the decision of Wigram, V.-C., in the same case, thought otherwise. Lord Cottenham also thought (*h*),

(*a*) Per Lord Denman, C. J., and Williams, J., in *Fellowes v. Clay*, 4 Q. B., N. S. 313—Coleridge, J., and Patteson, J., contra.

(*b*) *Salkeld v. Johnston*, 2 Ex. 256.

(*c*) Per Lord Cottenham, C., Coltman, J., and Erle, J., in *Salkeld v. Johnston*, 1 M. & G. 242; 2 C. B. 749; and by the

Court of Exchequer, 2 Ex. 256; Wigram, V.-C., 1 Hare, 196; Tindal, C. J., and Cresswell, J., in the same case, 2 C. B., contra.

(*d*) *Fellowes v. Clay*, 4 Q. B., N. S. 313.

(*e*) 1 M. & G. 272 *et seq.*

(*f*) 1 Hare, 196.

(*g*) 4 Q. B., 313, 335.

(*h*) 1 M. & G. 268.

that the words "by composition real" are introduced by way of example only (*i*), but that the subsequent words "or otherwise" render them useless; the whole being tantamount to an enumeration of every possible ground of discharge, which would be equivalent to the simple words, "all claims to discharge from tithes."

Where tithes have been demised for life or years, or any composition for them has been made in writing by the owner of them with the owner or occupier of the land for any such term, and the demise or composition was subsisting at the passing of the act, and any action or suit is instituted for the tithes in kind within three years next after the determination of such demise or composition, the case is not within the act (*k*).

What compositions excluded.

The Tithe Commutation Act (*l*) has rendered the 2 & 3 Will. 4, c. 100, as regards its direct object, of little practical importance, and this branch of the subject of the present treatise may seem unnecessary to be considered. But as the decisions on this last statute show the principles of interpretation of the other statutes *in pari materid*, and in order to present a complete and connected view of the entire subject, this brief exposition of the 2 & 3 Will. 4, c. 100, is here given.

Effect of Tithe Commutation Act on c. 100.

The main provisions of the 2 & 3 Will. 4, c. 100, in effect, though in a somewhat different form, have been extended to *Ireland* (*m*). The words "by composition real or otherwise" in the statute for *England* are omitted in that for *Ireland*, which enacts that all these prescriptions and claims shall, in all cases whatever, be sustained, &c., &c., as in the enactment for *England* (*n*).

Provisions of this act extended to *Ireland* with variations.

The language of each of these two statutes is in substance and effect the same, and is to receive the same interpretation, and to be considered as used in the

Interpretation of the two acts.

(*i*) See also 4 Q. B. 319, 332, 340.

(*k*) 2 & 3 Will. 4, c. 100, s. 4.

(*l*) 6 & 7 Will. 4, c. 71.

(*m*) 1 & 2 Vict. c. 109, ss. 18—24; and as to the Crown, see ss. 49, 50.

(*n*) See *Shiel v. The Incorporated Society*, 10 Ir. Eq. Rep. 411.

same sense, and with the same meaning in each of them (*o*).

Gross sums charged on land or rent, legacies.
3 & 4 Will. 4, c. 27.

Sums of money in gross charged upon or payable out of any land or rent within the meaning of the 3 & 4 Will. 4, c. 27, and also legacies from or out of either real or personal property, are also embraced by this statute (*p*).

Sum may be charged *ex contractu*,

The sum may be so charged or payable *ex contractu*, as a mortgage (*q*), or a settlement (*r*); and a sum of money secured by a mortgage of a legacy charged on land is a sum secured by a mortgage of land within this section. For by section 1, the term land, unless the nature of the provision or the context of the statute exclude the meaning, extends to any interest in land, and chattel interests as well as freehold, and no such ground of exclusion exists here (*s*).

And although the mortgage debt itself as against the mortgagor personally may be barred, yet the property mortgaged may be of such a nature, *e. g.*, reversionary, that, notwithstanding such bar, the mortgagee may enforce the debt against such property when the interest in the property falls into possession, or within twenty years after that time (*t*). And if in the meantime the mortgagor seek the aid of a court of equity to obtain the possession of the property on the ground of such bar as against the mortgagor personally, such aid will not be given (*u*).

—or by operation of law,

The sum may be also so charged or payable by operation of law, as by judgment, and whether original or revived (*x*), and whether revived by *scire facias* with

(*o*) See *Shiel v. The Incorporated Society*, *supra*.

(*p*) Sect. 40.

(*q*) See *Dearman v. Wyche*, 9 Sim. 570; *Du Vigier v. Lee*, 2 Hare, 826; *Wriaon v. Vize*, 2 Con. & L. 138; *Humble v. Humble*, 24 Beav. 535.

(*r*) *Peyton v. M'Dermott*, 1 Dru. & Wal. 198; *Burrowes v.*

Gore, 6 H. of L. Cas. 907; 4 Jur., N. S. 1245, *S. C.*

(*s*) *Seager v. Aston*, 3 Jur., N. S. 481.

(*t*) *Ib.* 490.

(*u*) *Ib.*

(*x*) *Farran v. Beresford*, 10 Cl. & F. 819; *Furrell v. Gleeson*, 11 *Ib.* 702; *Harty v. Davis*, 13 Ir. Law Rep. 23; *Murray v. Clarke*,

or without any change of parties (*y*), or by acknowledgment in writing (*z*), except those which, in Ireland at the passing of the c. 27, were barred by the 8 Geo. 1, c. 4 (I.) (*a*), and whether the judgment, owing to the nature of the assets of the judgment debtor, be such that it may operate against land, but cannot operate against personal estate (*b*). For a judgment, although not an actual or a direct, is yet a potential charge on land (*c*); and judgments sought to be enforced against the personal assets of the debtor are equally within this statute as when sought to be enforced against the realty. But if not a court of equity, after the lapse of the period assigned by the statute, would, by analogy, refuse to enforce the judgment against personal assets (*d*).

The sum may be also so charged or payable by or —or by a lien. through a lien, other than a judgment as such, *e. g.*, the lien of a vendor for his unpaid purchase-money (*e*), or other liens (*f*), or so charged or payable in any other manner (*g*).

It has been doubted whether the produce of real estate, directed to be sold, be a sum of money charged upon or payable out of land within the section 40 (*h*). By the section 1, unless the nature of the provision or the context of the statute exclude the meaning, land extends to any interest in it, as well chattel interests as freehold, and as well in equity (*i*) as at law. That

Whether produce of land to be sold be such a sum.

4 Ir. C. L. Rep. 610; *Kealy v. Bodkin*, Sausse & S. 211; *Henry v. Smith*, 1 Con. & L. 506; *Vincent v. Goring*, 1 Jones & Lat. 697; *O'Hara v. Creagh*, Longf. & T. 65.

(*y*) *Ib.*; *Re Blake*, 2 Ir. Ch. Rep. 643; *Ottivell v. Furrar*, 1 Sausse & S. 218, n.

(*z*) *Harty v. Davis*, *supra*.

(*a*) *Morrough v. Power*, Longf. & T., Ir. Rep. 644.

(*b*) *Watson v. Birch*, 15 Sim. 523.

(*c*) *Henry v. Smith*, 1 Con. & L. 506.

(*d*) *O'Hara v. Creagh*, Longf. & T. 65.

(*e*) *Toft v. Stephenson*, 7 Hare, 1; on appeal, 1 De Gex, M. & G. 28; 5 Ib. 785.

(*f*) See *Du Vigier v. Lee*, 2 Hare, 326.

(*g*) See *Henry v. Smith*, 1 Con. & L. 506.

(*h*) See *Pawsey v. Barnes*, 20 L. J., N. S., Eq. 898.

(*i*) Sect. 24.

such produce is an interest in land within the section 1, unless the term interest in that section is used in the restricted sense hereafter suggested, can scarcely be doubted, and therefore is land within the section 40.

Secured by
trust preserves
the right
longer.

When, however, these sums are charged upon land and secured by means of a trust, and the trustees, by virtue of their estate in the land, are in a position to enter, and accordingly enter upon it, the person claiming the sum, although more than twenty years may have elapsed since the right to receive it accrued, will not be barred (*k*).

Operation of
sect. 40 of c. 27.

In *Forsyth v. Bristowe* (*l*), Parke, B., said it may be a question whether section 40 of c. 27 applies to anything but the remedy against the realty, and, therefore, whether it extends to actions on a covenant to pay mortgage money or bonds to secure the payment thereof. But in *O'Hara v. Creagh* (*m*), the court said, in relation to judgments, that the statute is not to be construed as restricted to actions against real estate, but as affecting charges on real estate, whether sought to be enforced against either the real or the personal representatives, and that even if this were so the court would by analogy act upon it. It is difficult to cut down the general operation of the words of this section and divide, as it were, the effect of a judgment or security (*n*).

Secured by
bond only, not
a charge on
real estate.

A sum of money secured by the bond of an ancestor, although in one sense payable out of, is not a charge upon, real estate; the bond only giving a right of action against the heir of the obligor, if named in the bond, is not a debt charged upon or payable out of land within the section 40 of c. 27 (*o*).

Simple con-
tract debts.

Whether a court of equity at the instance of a simple contract creditor, whose immediate right against real

(*k*) *Young v. Lord Waterpark*,
18 Sim. 199. See also *Cox v.*
Dolman, 2 De Gex, M. & G.
592.

(*l*) 8 Ex. 716.

(*m*) Longf. & T. Ir. Rep. 65.

(*n*) Per Richards, B., *Ib.* 76.

(*o*) *Roddam v. Morley*, 2 K.
& J. 336; 1 De Gex & J. 1, on
appeal.

estate is barred by the Statute of Limitations, will marshal the assets of a debtor, and thus indirectly give to such creditor the same time for the recovery of his debt as a specialty creditor may have, is a question. "Simple contract creditors," said Turner, V.-C. (*p*), "have now a direct right against the real estate in case of a deficiency of the personal (*q*), and do not require the aid of the court for that purpose, in order to give them a remedy against the real estate; and for whatever purpose the doctrine of marshalling may be necessary to be kept on foot, I do not think that it ought to be kept alive for the purpose of giving indirectly a right which could not be asserted directly. The consequence would be that, in all cases where there are any specialty debts, the simple contract creditors would be entitled to sue the real estate at any time within which the specialty creditors could have sued; in effect to create in equity the same limitation as to simple contract debts as the statute (*r*) has prescribed as to specialties." Marshalling assets.

Legacies are also expressly embraced by the section 40. Legacies. When charged on land they would be within these terms of this section prior to the term legacy, and therefore this term must have been intended by the legislature to apply to legacies not so charged. But whether legacies not so charged are within this section was formerly much doubted (*s*). In *Coope v. Cresswell* (*t*), Kindersley, V.-C., said "legacy seems to have been introduced into the act by a blunder. Considering, however, the context of the act, especially the terms of this section as to money, in general, when charged on land, and the section 42, the conclusion, that legacies payable out of personal estate, as well as

(*p*) *Fordham v. Wallis*, 10 Hare, 217.

(*q*) 3 & 4 Will. 4, c. 104.

(*r*) 3 & 4 Will. 4, c. 42. See *Forsyth v. Bristow*, 8 Ex. 716.

(*s*) See 2 Myl. & C. 315, n.

(*t*) L. R., 2 Eq. 116.

those charged on land, are within the section 40, seems irresistible, and is now clearly and firmly so settled (*x*)."

Life annuity out of personality.

A life annuity payable out of personal estate is a legacy within the section 40 (*y*), although, as we shall presently see, the arrears of such an annuity have been determined, and rightly determined, not to be within the section 42. For the term legacy, although having, familiarly and colloquially, a restricted meaning, may receive, according to circumstances, a more general one (*z*), and even be applied to a devise of land (*a*); and accordingly in wills, unless there be something in them showing that the testator distinguished these annuities from legacies of gross sums (*b*), the term legacy is interpreted to include these annuities (*c*).

Legacy, when not recoverable from estate of executor.

A legacy, the right to which, as against an executor possessing sufficient assets of the testator to satisfy it, has accrued, but is not sued for as a legacy out of such assets within twenty years afterwards, will be lost (*d*), and cannot be recovered after that time as a debt due from the executor out of real estate charged by him with the payment of his debts. Treating him as a debtor cannot prolong the time for claiming the legacy (*e*).

Share of residue under a will.

A share of residue bequeathed by a will is a legacy within the sect. 40. Thus where the claim was by one of two residuary legatees against the executors of the executor of the original testator in 1835, and it appeared that the testator's executor proved the will, and in 1791

(*w*) *Sheppard v. Duke*, 9 Sim. 569; *Henry v. Smith*, 2 Dru. & War. 891; *Bullock v. Downes*, 9 H. of L. Cas. 1. See also *Prior v. Horniblow*, 2 You. & C. 200; *Piggott v. Jefferson*, 12 Sim. 26.

(*y*) *Roch v. Callen*, 6 Hare, 581; *Ashwell's Will*, John. 112.

(*z*) Per Knight Bruce, V.-C., *Cornfield v. Wyndham*, 2 Coll. 184.

(*a*) *Hope v. Taylor*, 1 Burr.

268; *Hardacre v. Nash*, 5 T. R. 716; *Evans v. Crosbie*, 15 Sim. 600.

(*b*) See *Nannock v. Horton*, 7 Ves. 391; *Cornfield v. Wyndham*, supra.

(*c*) *Ib.*; *Sibley v. Perry*, 7 Ves. 522.

(*d*) *Sheppard v. Duke*, supra; *Piggott v. Jefferson*, 12 Sim. 26.

(*e*) *Piggott v. Jefferson*, supra.

died, and that as far back as 1800 or soon afterwards the claimant had an opportunity of ascertaining what the clear residue was and requiring payment of the amount. The present right to receive the residue accrued thirty years previously, and it was not contended that any suit was necessary to ascertain it, and the claim was therefore held to be barred, and the defendant was allowed to set up the statute as a bar (*f*).

In *Prior v. Horniblow* there had not been any appropriation by the executor of the testator of any part of the residue, so as to constitute the relation of trustee and *cestui que trust* in respect thereof, as in *Phillipo v. Munnings* (*g*), presently to be noticed; and although the defendant was allowed to avail himself of the statutory bar, the case is not an authority that such bar would have been allowed to the original executor. Indeed it will be seen from the subsequent cases that he would not be allowed to avail himself of such bar.

Again, although the question did not call for a decision, Shadwell, V.-C., considered that the act where it speaks of a legacy does, in effect, speak of a share of a residue, and does not make any difference between a share of a residue and a legacy (*h*).

But the subject to which the statute is to be applied must be definite and ascertained; and in cases of residue courts of equity have adopted, as a rule, that a year after the death of a testator is the period within which his property may, with reasonable diligence, be administered (*i*). But Lord Eldon said (*k*) he knew of no case which prevents executors, if they choose, from

When to be ascertained.

(*f*) *Prior v. Horniblow*, 2 You. & Coll. 200. See also *Adams v. Barry*, 2 Coll. 285.

(*g*) 2 Myl. & C. 309.

(*h*) *Christian v. Devereux*, 12 Sim. 264. See also *Dinsdale v.*

Dudding, 1 You. & Col. C. C. 265.

(*i*) See *Wood v. Penoyre*, 13 Ves. 325, 333; *Brooke v. Lewis*, 6 Mad. 358.

(*k*) *Angerstein v. Martin*, Turn. & R. 232, 241.

paying legacies, or handing over the residue within the year; and if it is clear, *currento animo*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing. From the expiration of that period, therefore, as a general rule, the operation of the statute, in such cases, would commence. If however subsequent to that period any assets of the testator, forming part of his residuary estate, come to the possession of his representatives, the statute, as to such assets, would not begin to operate until the possession thereof (*h*).

Residue and share of on intestacy.

A residue and a share of residue, as a legacy only, are within the c. 27. But the principle of that enactment is equally applicable in the case of the personal estate, and any share of the personal estate, of a person dying intestate. To such cases accordingly, from the 31st December, 1860, a legislative provision, similar to that of sect. 40 in c. 27, has been applied (*i*).

Whether when to be ascertained by suit.

Whether a residue, where a suit may be necessary to ascertain it, be within the sect. 40, may be a question; and if within it, another question would be at what time the right to receive it is to be deemed to accrue.

But a pecuniary legacy bequeathed to an executor upon trusts for certain persons and by him severed from the testator's general personal estate, or a share of residue so bequeathed and by him appropriated accordingly, is a trust fund and he cannot avail himself of the statutory bar against the *cestuis que trust* (*j*). It was attempted to treat the case as a suit for a legacy. But the court said, that what the executor would have done by paying the legacy to a trustee he had done by severing it from the testator's property and appropriating it to the particular purpose pointed out by the will, and could not be con-

(*h*) See *Adams v. Barry*, 3 Coll. 285; *Binns v. Nichols*, 14 W. R. 727; L. R., 2 Eq. 256; 35 L. J., Eq. 635, S. C.

(*i*) 23 & 24 Vict. c. 38, s. 18.
(*j*) *Phillipo v. Munnings*, 2 Myl. & C. 309.

sidered as acting in his character of executor, but in that of trustee only; and the suit was not to be treated as a suit for a legacy, but to compel him to account for a breach of trust, and therefore was not within the terms of the act (*k*).

Only charges on land or rent, including legacies so charged and those not so charged, are within the section 40 (*l*). That section does not apply to anything but the remedy against the realty, and not to actions on a covenant to pay, or a bond to secure the payment of rent or of mortgage money (*m*), and so also the section 42 (*n*). These actions are within a subsequent enactment (*o*) of the same session.

Only charges on land and rent within sect. 40.

Pecuniary claims arising periodically, as arrears of dower, of rent, of interest for sums in gross charged upon or payable out of any land or rent, and for legacies, are also embraced by the 3 & 4 Will. 4, c. 27.

Periodical pecuniary claims.

None of these arrears are to be recovered or obtained, in general, for a longer period than six years, computing that period from the times which will hereafter appear (*p*).

The ordinary form of expression in the Statutes of Limitation is that all actions shall be commenced within a limited period and not after (*q*). The terms of the 3 & 4 Will. 4, c. 27, ss. 41, 42, are in the negative only, but those of the c. 42, s. 3, are not merely negative, but import an affirmative also; not merely that arrears for more than ten years may not be sued for, but that they may be sued for during all that time (*r*). The terms of the sects. 41 and 42 of the

(*k*) See also *Roche v. Callen*, 6 Hare, 531; *Dinsdale v. Dudding*, 1 You. & Col. C. C. 265; *Bullock v. Downes*, 9 H. of L. Cas. 1.

(*l*) *Elvy v. Normood*, 5 De Gex & S. 240; 2 Kay & J. 345.

(*m*) See *Paget v. Foley*, 2 Bing. N. C. 690; *Strachan v. Thomas*, 12 Ad. & E. 536; *Forsyth v. Bristowe*, 8 Ex. 720; *Manning v.*

Phelps, 10 Ib. 59.

(*n*) *Elvy v. Normood*, supra; *Manning v. Phelps*, supra.

(*o*) Cap. 42, s. 3.

(*p*) Sects. 41, 42.

(*q*) 21 Jac. 1, c. 16; 3 & 4 Will. 4, c. 27, ss. 2, 24, 28, 30, 33, 40, 43; c. 42, s. 3.

(*r*) See *Paget v. Foley*, 2 Bing. N. C. 690.

c. 27, however, are also, not that the action shall be brought within six years, but that the arrears shall be recovered within that time or not at all (*s*).

Arrears of
dower,

No arrears of dower, arising beyond six years next before the commencement of any action or suit to recover them, can be recovered or obtained (*t*).

The sect. 41 is directed to only arrears of dower and to damages on account of such arrears, and not to the claim to dower itself, that is, to a third part of the husband's lands and hereditaments liable to it, to be set out by metes and bounds. That claim is, as we have already seen, within the 2nd section (*u*).

—of rent, or of
interest.

No arrears of rent, or of interest for any sum of money charged upon or payable out of any land or rent, or for any legacy, arising beyond six years next after becoming due, or next after a written acknowledgment of them, are to be recovered (*x*).

Of what rents.

The 42nd section contemplates and provides for only the recovery of arrears of rent, arrears of interest for gross sums charged upon or payable out of any land or rent, and for legacies (*y*), and as against land or rent only, irrespective of the persons liable (*z*).

The arrears of rent within the section 42 may be not only of money rents, but of rents of corn, cattle, fowl, or any other profit to be delivered or yielded, and even of corporeal services (*a*) for which a distress can be made.

Where rent is charged upon or payable out of land, and not also secured by any collateral and personal obligation by specialty, the arrears of such a rent for only six years are recoverable (*b*).

(*s*) 7 C. B. 587.

(*t*) Sect. 41; *Bamford v. Bamford*, 5 Hare, 203.

(*u*) Vide ante, p. 332.

(*x*) Sect. 42.

(*y*) See *James v. Salter*, 3 Bing. N. C. 544; 7 C. B. 591; 1 M. & G. 651.

(*z*) *Harrison v. Duignan*, 2 Dra. & War. 295; *Francis v. Grover*, 5 Hare, 39; *Hunter v. Nockolds*, 1 M. & G. 640.

(*a*) Co. Litt. 162 b.

(*b*) *Humfrey v. Gory*, 7 C. B. 587.

But arrears of a rent charged upon or payable out of land, and also secured by any such obligation, although not recoverable as against the land for a longer period than six years, are nevertheless recoverable under the 3 & 4 Will. 4, c. 42, s. 3 (c), for a period of twenty years.

The unpaid portions of a sum in gross charged upon or payable out of land, and payable by instalments, are arrears of rent within the 42nd section (d); but when charged upon or payable out of rent are not within that section.

It is very doubtful whether, where the instrument creating the rent contains a clause of re-entry conditional on there being no distress on the premises, such clause can be made available for the recovery of the arrears, which by the express terms of the statute cannot be distrained for, such clause being (e) in the nature of a power of distress (f).

When not recoverable by distress.

A power to sell or mortgage cannot be exercised to raise arrears of an annuity not recoverable by distress or action; and the demand itself, and not merely the remedy for its recovery, being barred by the 42nd section (g).

The arrears however, although not recoverable by means of the ordinary remedy, may be obtained by virtue of the possession of the land subject to the charge, to the full extent; for the statute does not deprive the claimant of the rights and benefits which such possession gives. Therefore where a jointress was in possession of the lands on which her jointure was charged, and the rents were for many years inadequate to answer it, but afterwards during such possession were more

Irrecoverable by ordinary remedy, recoverable by possession of the land.

(c) *Paget v. Foley*, 2 Bing. N. C. 679; *Strachan v. Thomas*, 12 Ad. & E. 556; *Manning v. Phelps*, 10 Ex. 59.

(d) *Uppington v. Tarrant*, 12 Ir. Ch. Rep. 262.

(e) Litt. s. 327.

(f) Per Smith, M. R., *Smith v. Smith*, 5 Ir. Ch. Rep. 88, 97.

(g) Per Smith, M. R., *Smith v. Smith*, 5 Ir. Ch. Rep. 88, 100.

than adequate, and she continued in possession, she was held entitled to hold the lands, as against claimants of charges *puisné* to her, until all the arrears were satisfied (*h*). But the possession of a receiver, unless where it may be treated as the possession of a prior creditor under the 42nd section, and in reference to interest or arrears of rent, cannot prevent the bar of the statute (*i*).

None of a rent barred.

No arrears of a rent which is charged upon or payable out of land, and not secured by any collateral and personal obligation by specialty, but which is barred by the lapse of the statutory period, are recoverable (*h*).

Only arrears of rents of inheritance.

Arrears of rent within the 42nd section are arrears of only those rents to which the c. 27, according to its title and preamble (*l*), was intended to apply, and which we have already shown (*m*). For the first time, the remedy by distress for such arrears, as well as by action or suit, is limited by this statute, but is not limited by the c. 42 (*n*).

Not of conventional ones.

Arrears of conventional rents are not within the 42nd section (*o*). When such rents do not arise on a specialty the arrears are limited by the 21 Jac. I, c. 16, s. 3 (*p*).

Nor of arrears of annuity out of personalty.

The arrears of an annuity not charged on land, but payable out of personal estate only, are not within the 42nd section, which therefore cannot be pleaded in bar to a claim for the arrears of such an annuity for more than six years (*q*).

Arrears of interest on mortgages.

Only six years' arrears of interest can be claimed in a suit against a mortgagor or against persons claiming

(*h*) *Battersby v. Rochfort*, 10 Ir. Eq. Rep. 489.

(*i*) *Anon.*, 2 Atk. 15; *Harrison v. Duignan*, 2 Dru. & War. 295.

(*h*) *James v. Salter*, 3 Bing. N. C. 544.

(*l*) *Paget v. Foley*, 2 Bing. N. C. 679.

(*m*) Vide ante, p. 343 *et seq.*

(*n*) 7 C. B. 580.

(*o*) *Paget v. Foley*, 2 Bing. N. C. 690; *Grant v. Ellis*, 9 Mee. & W. 118.

(*p*) *Stacey v. Freeman*, Hutt. 109.

(*q*) *Rock v. Callen*, 6 Hare, 531; *Ashwell's Will*, 1 John. 112.

under him for value (*r*); although the principal money be also secured by bond or covenant.

So in cases of mortgage without bond or covenant, mere equitable mortgages, liens, where the debt as against the person is barred by the Statute of Limitations, in cases of bankruptcy and insolvency, where the person of the debtor is discharged and only the land left to which the creditor can resort (*s*), arrears for only six years can be recovered.

Without bond or covenant.

So where a mortgagee sold the property in mortgage, and the heir and administrator of the mortgagor (*t*) had assigned the equity of redemption for the benefit of the creditors of the mortgagor, in a suit by such assignee against the mortgagee claiming the surplus monies arising on such sale, deducting the mortgage monies and only six years' arrears of interest, the mortgagee was held to be entitled to only that amount of arrears (*u*).

When not against creditors of mortgagor.

But where the mortgagees sold the mortgaged estate under a power of sale given to them by the mortgage, and paid the sale monies into court and afterwards petitioned the court in a suit for the administration of the estate of the mortgagee for the transfer of the funds to themselves on account of principal, interest and costs, claiming arrears of interest for nearly twenty years, they were held to be entitled to, as against the mortgagor and his assignee in insolvency on such petition, the whole interest claimed (*x*).

When against them.

The right of a mortgagee to tack his claim for arrears of interest beyond six years, against either persons claiming as volunteers under, or the heir of, the

By tacking.

(*r*) *Harrison v. Duignan*, 2 Dru. & War. 295; *Hughes v. Kelly*, 3 Ib. 482; *Evans v. Bagwell*, 2 Con. & L. 612; *Hunter v. Nockolds*, 1 Mac. & G. 640; 5 De Gex & S. 243; *Shaw v. Johnson*, 1 Drew. & S. 412; *Bolding v. Lane*, 1 De Gex, J. & S. 122; see 11 H. L. C. 134.

(*s*) Per Wigram, V.-C., *Du Vigier v. Lee*, 2 Hare, 326.

(*t*) 9 L. T. R., N. S. 565; 12 W. R. 118.

(*u*) *Mason v. Broadbent*, 33 Beav. 296.

(*x*) *Edmunds v. Waugh*, Law Rep., 1 Eq. 418.

mortgagor, is not affected by the section 42. Therefore, notwithstanding this section, more than six years' arrears of interest may be obtained by a mortgagee, by means of such right (*y*), as against such persons (*z*) and such heir (*a*), but, before the 1 Will. 4, c. 47, not against the devisee of the mortgagor when he left no heir (*b*), and as well when the arrears are only a simple contract debt (*c*) as when they are secured by specialty in which the heirs of the mortgagor are bound; and it makes no difference whether the debt claimed be secured by a covenant in the same or any other deed (*d*). In *Jackson v. Sinclair* (*e*), indeed, where the suit was not properly framed to raise the question, Sir J. Romilly, M. R., refused to decide whether a mortgagee can or cannot tack his claim for arrears of interest beyond six years, as against the heir of the mortgagor.

The case of *Du Vigier v. Lee* has been the subject of much observation; but although as we shall presently see, another case has been decided in direct opposition to it, has never been overruled. It was recognized in *Elvy v. Norwood* (*f*), and Parker, V.-C., said his decision there was not inconsistent with it, and in *Hunter v. Nockolds* (*g*), the Lord Chancellor, after observing that in *Du Vigier v. Lee*, the party was also personally liable on his bond, said it was in reference to that specialty involving a circuitry of action that the case was decided; and it was again recognized by Stuart, V.-C., in *Shaw v. Johnson* (*h*). But in *Round v. Bell* (*i*), Sir J. Romilly, M. R., referring to *Du Vigier v. Lee*, as deciding that where there is a bond or cove-

(*y*) See 2 Fon. Eq. 274.

(*z*) *Du Vigier v. Lee*, 2 Hare, 326.

(*a*) *Elvy v. Norwood*, 5 De Gex & S. 240.

(*b*) *Hunting v. Sheldrake*, 9 Mee. & W. 256.

(*c*) *Rolfe v. Chester*, 20 Beav. 610; *Thomas v. Thomas*, 22 Beav. 341.

(*d*) *Elvy v. Norwood*, 5 De Gex & S. 240; *Sinclair v. Jackson*, 17 Beav. 405.

(*e*) 17 Beav. 405.

(*f*) 5 De Gex & S. 240.

(*g*) 1 Mac. & G. 640, 650.

(*h*) 1 Drew. & S. 412.

(*i*) 30 Beav. 121.

nant, a mortgagee may recover twenty years' arrears, said that did not seem to be the view adopted by Lord St. Leonards in *Hughes v. Kelly*, and that the cases of *Elvy v. Norwood* and *Hunter v. Nockolds* are scarcely consistent with it; although, as we have just seen, Parker, V.-C., in *Elvy v. Norwood*, said he was acting in accordance with the view taken in *Du Vigier v. Lee*, decided that although there was both a covenant and bond for securing the mortgage money and interest, the personal representative of the mortgagee was not entitled, in a suit for foreclosure against the devisees, the children of the mortgagor, to claim more than six years' arrears of interest.

The arrears of interest beyond six years, claimed by a mortgagee under his right of tacking, may be claimed both on foreclosure and on redemption (*k*); although, in some cases, the language of the court leads to the inference that the terms would be more favourable to a mortgagee in a suit for redemption than in one for foreclosure (*l*).

And either on foreclosure or redemption.

A suit for foreclosure is a suit within the section 42, to recover either money charged on land (*m*), or land itself (*n*).

Interest upon judgments is within the section 42; and as well upon those which bore interest before, as upon those which by subsequent statutes have been made to bear it (*o*).

Interest on judgments.

If the right to the principal be barred, so is the right to the interest, which is an accessory only, and must follow the principal (*p*).

(*k*) *Du Vigier v. Lee*, 2 Hare, 326; *Elvy v. Norwood*, 5 De Gex & S. 240; 6 Hare, 160.

(*l*) See *Sinclair v. Jackson*, 17 Beav. 405, 412.

(*m*) *Du Vigier v. Lee*, 2 Hare, 326.

(*n*) *Sinclair v. Jackson*, 17 Beav. 405, 410.

(*o*) *Henry v. Smith*, 1 Con. & L. 506; *Vincent v. Going*, 1 Jo. & Lat. 697.

(*p*) *Clark v. Alexander*, 8 Scott, N. R. 147.

What not a mortgage with-
in c. 27.

A mortgage of turnpike tolls is not a mortgage of land within the c. 27, and the full amount of interest may be recovered thereon and is not limited to six years (*q*).

Where arrears
are secured by
a trust.

Where the land is affected with any trust for securing the arrears of rent (*r*), or of interest (*s*), the full amount of arrears may be claimed against the land. But a simple disposition of the land, subject to or merely charged with a rent (*t*) or a sum in gross (*u*), creates no trust affecting the land, but a mere obligation (*x*), giving the claimant no right to any arrears of rent or of interest beyond six years. In *Harrison v. Duignan* the annuity, and in *Hughes v. Kelly* the gross sum, was secured by covenant as well as charged on the land, but in each case the covenant was not with the person entitled to the charge, but with a third person, and in the latter case the covenant did not extend to interest.

Where the
interest in the
land charged
is only rever-
sionary.

Where the person charging the land with an annuity has in the land a reversionary interest only, the arrears of the annuity, so long as such interest continues, may be recovered for more than six years (*y*). But where such an interest is charged with a gross sum by way of mortgage, the interest being reversionary makes no difference. The mortgage is of an interest in land, and it is a common thing to mortgage a contingency or even a mere possibility; in such a case, the mortgage may be

(*q*) *Mellish v. Brooks*, 3 Beav. 22.

(*r*) *Cox v. Dolman*, 2 De Gex, M. & G. 592; *Snow v. Booth*, 2 K. & J. 192; 8 De Gex, M. & G. 69; *Lewis v. Duncombe*, 29 Beav. 175.

(*s*) *Sham v. Johnson*, 1 Drew. & S. 412; *Arch v. Ward*, 12 Sim. 472; *Gough v. Bult*, 16 Ib. 323; *Playfair v. Cooper*, 17 Beav. 187; *Watson v. Saul*, 5

Jur., N. S. 404; *Blower v. Blower*, Ib. 38; *Gyles v. Gyles*, 9 Ir. Eq. Rep. 185.

(*t*) *Harrison v. Duignan*, 2 Dru. & War. 295; *Francis v. Grover*, 5 Hare, 39.

(*u*) *Hughes v. Kelly*, 3 Dru. & War. 482.

(*x*) *Chappell v. Rees*, 1 De Gex, M. & G. 893.

(*y*) *Wheeler v. Howell*, 3 Kay & J. 198.

foreclosed before the contingency happens, and such a mortgage is therefore subject to the same rules of law as any other, and only six years of arrears of interest are recoverable (z). But the reversionary interest itself, until it come into possession, will not be affected (a).

As regards interest in respect of any legacy, although an annuity be a legacy and may be within the section 40, yet the yearly payments made in respect of an annuity cannot be treated as interest in respect of a legacy, but are part of the corpus of the legacy, that legacy being the entire annuity, and therefore are not within the section 42 (b). But Lord St. Leonards, remarking upon this case (c), said, "accruing payments of an annuity can hardly be considered as payments in part of the principal money constituting the annuity. An annuity for life is not a principal sum payable by instalments for a fixed period, but an annual sum payable for an uncertain period of time, although the event upon which it is to cease is certain; that the word interest in this section may well be held to mean the advantage accruing from the gift, and that what the annuitant receives is really interest or income to the amount of the annuity."

Interest on legacies.

The six years of interest on a legacy is calculated from the filing of the bill, although not filed by the legatee, and not from the date of the decree (d).

How calculated.

It would seem, however, that these charges and claims can only be affected by the statute when the person entitled to them sues for their recovery. For the statute provides for only those cases where the claimant himself comes as a plaintiff to enforce his right, either by a proceeding primarily by him, as a

When charges and claims are not affected.

(z) *Snolair v. Jackson*, 17 Beav. 405.

(a) *Seager v. Aston*, 3 Jur., N. S. 481.

(b) *Ashwell's Will*, John. 112.

(c) Treat. Real Prop. Stat. 2nd ed. 188.

(d) *Chappell v. Rees*, 1 De Gex, M. & G. 393.

foreclosure (*e*), or by others of which he may claim the benefit, as a general administration suit (*f*), or by an interlocutory application by him in such a suit (*g*); and not where he comes as a defendant, as in a suit for redemption (*h*), or on a petition by a mortgagor to obtain a transfer of the fund in mortgage (*i*), or in a suit instituted by a *puisé* creditor for raising his demand (*k*). But in *Mason v. Broadbent* (*l*), Sir J. Romilly, M. R., held that after a sale of the mortgaged property by a trustee for a mortgagee under a power of sale, the mortgagee, in a suit by the mortgagor to recover the surplus money, could not retain more than six years' interest. In *Edmunds v. Waugh* (*m*), however, Kindersley, V.-C., dissented from *Mason v. Broadbent*, and held that a petition by the representatives of the mortgagee in a suit by them for the administration of his estate, to obtain out of court the surplus monies arising from the sale of the mortgaged estate by them under a power of sale, is not a suit, within the section 42, to recover interest; and that they were therefore, in such a case, entitled to retain the whole of the arrears of interest, although for more than six years.

Damages.

Pecuniary claims in gross in respect of the periodical claims just noticed, as damages on account of arrears of dower (*n*), and on account of arrears of rent and of interest (*o*), are also embraced by this statute, c. 27.

(*e*) *Dearman v. Wyche*, 9 Sim. 570. See also 2 Hare, 339, and on *Dearman v. Wyche*, 1 Con. & L. 544; contra, *Wriarson v. Vize*, 2 Ib. 138.

(*f*) *Bennett v. Barnard*, 12 Ir. Eq. Ca. 229, and cases there cited.

(*g*) *Berrington v. Evans*, 1 You. & C. 484; 2 Jones & Lat. 714; *Peyton v. M'Dermott*, 1 Dru. & Wal. 198.

(*h*) *Elvy v. Norwood*, 5 De G. & S. 240.

(*i*) *Seager v. Aston*, 3 Jur., N. S. 484; 26 L. J., N. S., Ch. 809, S. C.

(*k*) See *Murphy v. Sterne*, 1 Dru. & Wal. 236; *Edmunds v. Waugh*, 14 W. R. 257; L. R., 1 Eq. 418; 35 L. J., Eq. 234, S. C. See also *Courtenay v. Parker*, 16 Ir. Ch. R. 320.

(*l*) 33 Beav. 297; 9 L. T. R., N. S. 565, S. C.

(*m*) *Supra*.

(*n*) Sect. 41.

(*o*) Sect. 42.

Damages, *damna*, in the common law, hath a special What. signification for the recompense that is given by the jury to the plaintiff for the wrong the defendant hath done unto him (*p*).

By damages on account of arrears of dower are to be understood the profits of the third part since the death of the husband dying seised (*q*), or the teste of the original, *usque judicium*, after deducting outgoings. And such damages as the wife has sustained by the detention of her dower (*r*), which are usually assessed severally, although damages given generally, without finding the value of the land, are good (*s*). But as they were given in satisfaction of an injury in the nature of a trespass, they were lost by the death of the demandant (*t*), or the tenant (*u*), before the judgment for them was perfected, and were no lien upon the land (*x*). It did not however follow, that when the widow was right in a court of equity, but the heir happened to die before she had fully established her right, she was not entitled to her mesne profits, although at law her right might be gone (*y*). For arrears of dower.

These damages were given by the Statute of Merton (*z*), How given. but only in a writ of dower *unde nihil habet*, for in no writ of right were damages to be recovered (*a*). It has been said, indeed, that a widow can have no damages, where her dower has been assigned in Chancery (*b*). But that is to be understood where the assignment is by

(*p*) Co. Litt. 257 a.
 (*q*) Co. Litt. 32 b; *Jones v. Jones*, 2 Cr. & J. 601.
 (*r*) Co. Litt. 32 b, n. (4).
 (*s*) *Hawes' case*, Hott. 141; *Dobson v. Dobson*, Ca. temp. Hardw. 19; 2 Barnard. 180, 207, 443, S. C.; 8 Mod. 25; *Hitchens v. Hitchens*, 2 Vern. 403; *Watson v. Watson*, 10 C. B. 8; *Jones v. Jones*, 2 Cr. & J. 601.
 (*t*) *Mordaunt v. Thorold*, 3

Lev. 275; *Curtis v. Curtis*, 2 B. C. C. 620, 630.
 (*u*) *Aleworth v. Roberts*, 1 Lev. 38; *Curtis v. Curtis*, supra.
 (*x*) Ibid.
 (*y*) Per Sir L. Kenyon, M.R. *Curtis v. Curtis*, 2 B. C. C. 620, 631.
 (*z*) 20 Hen. 3, c. 1; 2 Inst. 80.
 (*a*) Co. Litt. 32 b.
 (*b*) Co. Litt. 33 a.

the writ *de dote assignandâ*, issued by that court, on which there are no damages (*c*), and not when given to her by a decree of a court of equity (*d*).

For arrears of rent, &c.

Damages on account of arrears of rent and arrears of interest within the chap. 27 are only those which arise within six years after they become due, or next after an acknowledgment of them in the mode expressed in the statute (*e*).

Damages for arrears of interest in respect of any sum in gross charged upon or payable out of advowsons are not within the section 42; for that section in terms applies to the damages for arrears of interest in respect of sums in gross charged upon or payable out of land or rent only.

Tithes as chattels where recoverable.

Tithes, either when they are acknowledged to be due to some person and the right to them is not in dispute, or when the right to them is in question between spiritual persons only (*f*), are recoverable in the spiritual courts (*g*) as well as in the temporal courts.

Legacies, &c. in spiritual courts.

Legacies, and shares arising on the distribution of the estates of persons dying intestate (*h*), are recoverable in the spiritual courts as well as in courts of equity.

Arrears of, in equity.

Courts of equity in general never decreed an account of tithes for more than six years (*i*). By 53 Geo. 3, c. 127, s. 5, no suit in equity or in any ecclesiastical court to recover the value of any tithes can be brought but within six years from the time when the tithes became due.

When tithes, legacies, or other property which might be recovered in any temporal court, are claimed, they must be recovered in the spiritual courts within the

(*c*) See *Curtis v. Curtis*, 2 B. C. C. 620, 631.

(*d*) *Ibid*.

(*e*) Sect. 42.

(*f*) Toller on Tithes, 248.

(*g*) 1 Woodd. 154; 2 Eagle on

Tithes, 335; ante, p. 342.

(*h*) *Grignon v. Grignon*, 1 Hagg. N. R. 535; Williams on Executors, pt. v. bk. ii. c. 3.

(*i*) 2 Eagle on Tithes, 244.

same period as they are recoverable in the temporal courts (*k*).

As regards tithes the context of this act seems to show that the sect. 43 is applicable to them as chattels only, that is, arrears of them. But the object of this section and the mode of its operation have been doubted (*l*).

Sect. 43 of c. 27 as to tithes.

The words "other property" in this section apply to only property recoverable in a spiritual court as well as in a temporal court, or, in other words, where the spiritual court and the temporal court have concurrent jurisdiction, as in the case of pensions or other ecclesiastical or spiritual profit made temporal, or by law admitted to be or abide in temporal hands (*m*), and not where the recovery is within the jurisdiction of the spiritual court exclusively.

The matters embraced by the three statutes 3 & 4 Will. 4, c. 27, and the 2 & 3 Will. 4, cc. 71 and 100, have now been shown. Some matters, however, are not embraced by any Statute of Limitations. Others are not included, in terms at least, in some of the provisions of the c. 27.

Matters not embraced by any, or only some, Statutes of Limitation.

Dignities are not within any of the Statutes of Limitation; and although, in general, not lost, yet under some circumstances may be affected by the length of time during which the rights thereto have been permitted to lie dormant (*n*).

Dignities.

The principal matters to which the maxim *nullum tempus occurrit ecclesiæ* are still applicable are tithes, moduses and compositions belonging to spiritual or eleemosynary corporations sole as an inheritance. These are unaffected by any Statute of Limitations and were not intended to be touched (*o*), and, when belonging to them as chattels merely, that is, as claiming the

Tithes, moduses and compositions of certain corporations as an inheritance.

(*k*) 3 & 4 Will. 4, c. 27, s. 43.

(*n*) Vide ante, p. 264.

(*l*) Vide ante, p. 842.

(*o*) *Dean and Chapter of Ely*

(*m*) Co. Litt. 159 a.

v. *Bliss*, 2 De Gex, M. & G. 459.

render and the payment thereof by the persons bound to render and to pay them to the person entitled to receive them and independent of the estate therein as between persons claiming them adversely, are within the 2 & 3 Will. 4, c. 100, and are not embraced by, but expressly excepted from, the 3 & 4 Will. 4, c. 27 (*p*). The question of the liability to such render or payment can only arise on a claim against the tithe payer, and never can be affected by a contest or litigation between persons claiming the estate in the tithes (*q*). Whether, where one claimant is barred by the statute set up by the other, the latter can afterwards maintain an action against a person claiming exemption from the tithes, may be a question (*q*).

Lay advowsons.

Advowsons of a lay nature, as of hospitals, are not within the 3 & 4 Will. 4, c. 27 (*r*).

Advowsons as to some sections of c. 27.

Advowsons of ecclesiastical benefices are not, in terms, within sections 24, 25, 26, 27 and 28 of the 3 & 4 Will. 4, c. 27. These sections in terms are applicable to land and rent only.

Advowsons not within terms of sect. 28.

If advowsons be not within the section 28, yet as before this statute length of time was considered in equity as much a bar to the equity of redemption of an advowson as of any other estate (*s*), so now courts of equity will no doubt, by analogy to the 3 & 4 Will. 4, c. 27, adopt the period of limitation fixed by that section for land and rent.

Some suits and services.

The suits and services within this statute are those only for which a distress may be made. With the exception, therefore, of heriot custom, which, although a distress cannot be made for it (*t*), is included under the

(*p*) See *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574; 2 De Gex, M. & G. 459; *S. C.* sub nom. *Dean and Chapter of Ely v. Cash*, 15 Mee. & W. 617.

(*q*) 2 De Gex, M. & G. 478.

(*r*) Vide ante, p. 358.

(*s*) 2 Kenyon, 53.

(*t*) 2 Inst. 132; *Odiham v. Smith*, Cro. El. 590; *Hungerford v. Haviland*, Latch. 38; 3 Bulst. 325. But see *Rogers v. Birkmire*, Rep. temp. Hardw. 247; *Crew, C. J.*, in *Hungerford v. Haviland*, supra.

term heriot, those services for which a distress cannot be made, as suit to a court baron, when not arising under a feoffment or by prescription (*u*), those of which seisin is not had, or are claimed under a custom void in law (*x*), and reliefs claimed by executors (*y*), are not within this statute.

Those services which by common possibility may not happen or become due within the period fixed by the old Statute of Limitation, 32 Hen. 8, c. 2, and were therefore not within that statute (*z*), are not within the 3 & 4 Will. 4, c. 27.

Sums of money secured by mortgage, judgment, lien, or otherwise charged upon or payable out of advowsons, are not within the terms of the section 40; for that section applies to such sums when charged on or payable out of land and rent only. If, however, they are secured by bond or covenant, they are within the 3 & 4 Will. 4, c. 42, s. 3. Arrears of interest on any such sum, or any damages in respect of such arrears, are not within the section 42; for this section, in terms at least, embraces land and rent only.

Cases of breach of trust (*a*), of constructive fraud (*b*), and of claims founded on equitable waste, as between a tenant for life and a remainderman (*c*), are not within the terms of the 3 & 4 Will. 4, c. 27.

In cases of an equitable nature not within the express terms of the Statutes of Limitations, but analogous to those of a legal nature within those terms, courts of equity will follow the analogy of those statutes (*d*).

(*u*) 52 Hen. 8, c. 9.

(*x*) *Bradby*, 116.

(*y*) Co. Litt. 47 b, 83 a. But see 2 Leon. 179; 2 Roll. Rep. 371.

(*z*) Co. Litt. 115 a; 2 Inst. 95; *Bevill's case*, 4 Rep. 8; *Bennet v. King*, 3 Lev. 21.

(*a*) *Obee v. Bishop*, 1 De Gex, F. & J. 137.

(*b*) *The Marquis Clanricarde*

v. Henning, 30 Beav. 175.

(*c*) *Duke of Leeds v. Earl Amherst*, 2 Phill. 117.

(*d*) *Duke of Leeds v. Earl Amherst*, *supra*; *O'Hara v. Creagh*, Longf. & T. 65; *Bateman v. Boynton*, 14 W. R. 119; 35 L. J., N. S., Ch. 18; *Ib.* on app. 568, L. R., 1 Ch. App. 359.

Charges on
advowsons.

Some equitable
claims.

CHAPTER IV.

THE PERIODS OF LIMITATION.

Fixed by positive law.

THE periods of limitation are necessarily fixed by positive law, vary with the nature of the things to be claimed, and are regulated by the relative positions of the persons who are in, and those who are out of, possession. In any case, however, the possession, or *quasi* possession, ought not to be too short.

“*Quis hoc credat nisi pro teste vetustas ?*”

Where the possession is accompanied by a transfer of a public nature, the time of limitation is sometimes shorter than when accompanied by a transfer of a private character, or without any transfer, as in the case of the Statute of Fines (a).

But, independent of positive law, the particular space of time within which possession is to grow to the force and strength of property is not precisely determined, “either by natural reason, or the universal consent of nations ; but it is to be adjudged by the opinion of good and true men upon the case, not without some considerable degree of latitude. . . . But, in fixing the particular period, a regard shall be had to the ancient owner and the new possessor. To the former, lest he should be too soon excluded from the privilege of following and finding out what he had lost. . . . To the latter, lest he should undeservedly suffer damage when it is too late for him to gain redress by convicting the first injurious detainer, from whom the thing was honestly received ; or when the thing is so riveted to his fortunes and

(a) 4 Hen. 7, c. 4; 3 K. & J. 350.

estates, as to make the chief bottom upon which they depend" (b).

In our own country the periods of limitation have varied from time to time. It has been thought right that, where property has been transferred by certain public modes of disposition, a very short period should be limited within which the title may be impeached, as in the case of the Statute of Fines (c). Other periods, of greater or less duration, have from time to time been fixed within which, in ordinary cases, the rights of persons out of possession must be established, if at all (d).

SECTION I.

The Periods of Limitation for the Crown and the Duke of Cornwall.

The time of limitation prescribed for the Crown was, Sixty years for the Crown. at first (e), and indeed still is (f), sixty years. The principal difference between the first statute and the later ones is the alteration, by these, of the period from whence that term is computed. The statute of James the First was left unrepealed by those of George the Third, but has been since recently expressly repealed (g).

The right or title by reason whereof the Crown claims How computed. must first accrue within that term, computed not, as under the statute of James, backwards from the passing of it (h), but from the time next before the commencement of proceedings to recover, or in respect of, the property (i).

In the case of reversions and remainders, and of pos- Reversions and remainders. sibilities of them, the right or title first accrues when

(b) Puf. B. iv. c. xii. a. 9.

(c) 4 Hen. 7, c. 24.

(d) 3 Kay & J. 352.

(e) 21 Jac. 1, c. 2.

(f) 9 Geo. 3, c. 16; 48 Ib. c.

47 (I.).

(g) 26 & 27 Vict. c. 125.

(h) Wightw. 148, 158; 1 Jo. & Lat. 88.

(i) 9 Geo. 3, c. 16; 48 Ib. c. 47. See *Goodtitle v. Parker v. Baldwin*, 11 East, 488; *Mill v. The Commissioner of New Forest*, 18 C. B., N. S. 60.

the possession comes to the Crown. These interests, although, in effect, included in the body of the statute of James the First (*j*), were the subjects of express provision in that statute (*k*); and as that statute only barred the right of the Crown where there was a possession against it for sixty years prior to the passing of the act, that provision was properly introduced. It had not, however, any possible connection with, and therefore was improperly introduced into, the 9 Geo. 3 (*l*), and with equal impropriety was introduced from this latter statute into that of the 48 Geo. 3 (*m*).

Classes of.

These interests, the subjects of the specific provisions just noticed, are (1) reversions and remainders in the Crown on the passing of the statutes of George the Third; (2) those, and any possibility of them, in any of his predecessors on the determination of any limited estate of fee simple, or of any fee tail, or other particular estate coming into possession during the sixty years; (3) rights and titles first accruing within that term (*n*); (4) reversions and remainders arising either under conveyances by the Crown or any of its predecessors for any limited estate in fee simple, or of any estate in tail or other particular estate, and falling into possession within that term, or under conveyances by the Crown or any of its predecessors in fee tail or other particular estate, and continued in the Crown or any predecessor, or continuing in it within that term (*o*).

When and how affected.

As regards the second class of these reversions and remainders, the first clause of the provision relating to them cannot be governed by the 2nd clause of it, and therefore stands as an absolute saving of the right to a reversion in the Crown (*p*). The 2nd clause embraces

(*j*) 3 Inst. 191; 1 Jo. & Lat.
84.

(*k*) Sect. 3.

(*l*) See sect. 3.

(*m*) Sect. 3. See 1 Jo. & Lat.
84.

(*n*) Sects. 3, 9 Geo. 3, c. 16,
and 48 Geo. 3, c. 47.

(*o*) Sect. 4.

(*p*) See *Tuthill v. Rogers*, 1
Jo. & Lat. 86.

the interests of this nature, which, on the passing of the statutes of George the Third, had been in the predecessor of his Majesty, *e. g.* a reversion created by Charles the Second on a grant by him in tail male, which determined in 1776 (*q*); or one created by George the Second on a lease for years, which expired in 1780 (*r*).

Some doubt seems to have been entertained as to the effect of the 9 Geo. 3, c. 16, on reversions expectant on the determination of leases for years, under certain circumstances at least, as in *Att.-Gen. v. Lord Eardley*. In that case the Crown, from 1660 to 1749, granted in succession several leases of the tithes of the Bedford Level for thirty-one years, and by each lease reserved a third part of the tithes. The last lease was in 1749, and granted to a tenant for life of part of the land, and expired in 1780. In 1814, and again in 1819, the Crown filed an information against the person claiming the tithes under the remainderman after such tenant for life, and the right of the Crown was held, first at Nisi Prius (*s*), and again in Banc (*t*), not to be barred, for the information was within sixty years from 1780, when the last lease expired. The principal ground of the decisions, however, seems to have been that, although the profits had been returned in the auditor's accounts "*nil*," for more than sixty years, yet they were duly in charge within the 9 Geo. 3, c. 16. Now, however, the right or title to any hereditaments comprised or to be comprised in any lease for years or for lives, granted by or on behalf of the Crown or any predecessor or successor, is to be deemed to have first accrued on the determination of such lease, as against any person

Expectant on
leases for
years.

(*q*) *Tutill v. Rogers*, 1 Jo. & Lat. 36.

(*r*) *Att.-Gen. v. Maxwell*, 8 Pri. 76, n.; *Att.-Gen. v. Lord Eardley*, Ib. 89; Daniel's Rep.

299, S. C.

(*s*) *Att.-Gen. v. Maxwell*, 8 Pri. 76, n.

(*t*) *Att.-Gen. v. Lord Eardley*, Ib. 89; Daniel's Rep. 299, S. C.

whose enjoyment of such hereditaments has commenced during the term of such lease, or who claims under any such person, or whose receipt of the profits thereof so commenced (*u*).

Unless within the time, the Crown has been answered the profits,

In certain cases, however, the right of the Crown is, by the express terms of the statutes unaffected; as where, during the sixty years it has been answered, by virtue of that right, the rents, revenues, issues or profits of the property claimed, and, in the case of fee-farm or other rents, out of any of the property of which the estates, rights or interests, being defective, are established by the statutes, has received them (*x*). The provisions as to these rents are remedial in favour of the Crown, founded on the principle of doing at the same time equal justice to both the Crown and the subject; confirming the title of the one to the land, and the other to the rent; for the same reason, namely, their long possession and enjoyment, are a distinct recognition of the intention of the legislature to validate titles to lands, though the Crown had received rent out of them, and fall little short of an express declaration that the 1st section would and should cure defective titles to lands, though the Crown had, within sixty years, actually received rents out of them (*y*).

—or they had been in charge.

So, until very recently, as will shortly appear, the right of the Crown was unaffected if within the sixty years the rents, revenues, issues or profits of any hereditaments, of which the property claimed by the Crown was part, had been either answered to the Crown or duly in charge or *insuper* of record (*z*); and those rents mean rent services, or such rents as are rendered in lieu of, and as an equivalent for, issues and profits with

(*u*) 24 & 25 Vict. c. 62, s. 4.

(*x*) 9 Geo. 3, c. 16, ss. 1, 7; 48 Geo. 3, c. 47, ss. 1, 5. See 8 Inst. 191; *Simpson v. Gutteridge*, 1 Mad. 609; *Tutill v. Ro-*

gers, 1 Jo. & Lat. 86.

(*y*) 1 Jo. & Lat. 65, 66.

(*z*) 9 Geo. 3, c. 16, s. 1; 48 Geo. 3, c. 47, s. 1.

which, as being *ejusdem generis*, they are associated in the section 1 (a).

The payment, after the determination of an estate tail created in land by letters patent, of a rent reserved by them, is not an answering to the Crown, by force of any right or title to the land, of the profits of the land within the 48 Geo. 3, c. 47 (b). What not an answering the profits.

Being duly in charge within the statute of James was, in judgment of law, the roll of the pipe, and not a mere note before the auditor or any other person, and without being duly in charge there was no standing *insuper* of record (c). But by the later statutes the profits are now duly in charge when in charge by, to, or with any auditor or auditors or other proper officer or officers of the revenue (d). What is being in charge.

The subject referred to by all these statutes as being in charge is the profits of the property (e). The property itself, however, is frequently alluded to as such subject (f); and, substantially, when the profits of property are said to be in charge, the property itself may be said to be so.

Where no profits were rendered in respect of the property, and in the accounts of profits rendered by the auditor in respect of that and other property belonging to the Crown, the profits were returned, from the year 1716 down to the years 1814 and 1819 continuously, when proceedings were commenced by the Crown, as "*nil*," the profits were held to be, notwithstanding, in charge within the meaning of the 9 Geo. 3, c. 16, so as to save the right of the Crown, although no proceeding to recover the property within sixty years had been

(a) Per Blackburne, M. R., 1 Jo. & Lat. 67.

(b) *Tutill v. Rogers*, 1 Jo. & Lat. 36.

(c) 3 Inst. 189.

(d) 9 Geo. 3, c. 16, s. 2; 48 Ib. c. 47, s. 2; *Att.-Gen. v. Lord Eardley*, 8 Pri. 39; Daniel's Rep.

299, S. C.; *Tutill v. Rogers*, 1 Jo. & Lat. 86.

(e) See also 7 & 8 Vict. c. 105, s. 71.

(f) See 3 Inst. 189; *Att.-Gen. v. Maxwell*, supra; *Att.-Gen. v. Lord Eardley*, supra; *Tutill v. Rogers*.

taken (*g*). The object of such return being probably, as suggested by the court, to protect the Crown from the effect of continued nonpayment, whether from indulgence or from any other cause.

As regards the question of being or not being duly in charge, the last clause in this statute has no controlling effect on the 2nd clause, but was introduced with reference to cases of concealment only (*h*). In *Tuthill v. Rogers*, Lord Chancellor Sugden, referring to *Att.-Gen. v. Lord Eardley*, said he always doubted that decision, and that if the point arose again it might deserve further consideration. This case, however, may be supported on other grounds than the profits being in charge. The interest of the Crown was reversionary, expectant on the determination of a lease, which did not expire until the year 1780, and the proceedings by the Crown were taken in the year 1819, within sixty years from the time of the possession accruing to the Crown, although the court appears to have entertained some doubt on this view (*i*).

When land not
in charge.

The entry in the Crown rental of a rent reserved by letters patent granting land in tail, and received after the determination of that estate, is not a putting in charge of the land itself (*k*).

Property in
Ireland in the
"actual sei-
sin" of the
Crown unaf-
fected.

In relation to the property of the Crown in *Ireland*, if within the sixty years the Crown "have or shall have been in the *actual seisin*" of the property, the right to it is also unaffected (*l*). These words are not in either the statute of James the First or the 9 Geo. 3, and are of doubtful import. A difference of opinion as to their meaning arose between Sugden, L. C., and Blackburne, M. R. The interpretation of them by the

(*g*) *Att.-Gen. v. Maxwell*, 8 Pri. 76, n.; *Att.-Gen. v. Lord Eardley*, Ib. 39; Daniel's Rep. 299, S. C.

(*h*) *Att.-Gen. v. Lord Eard-*

ley, supra.

(*i*) Vide supra, p. 409.

(*k*) *Tuthill v. Rogers*, 1 Jo. & Lat. 36.

(*l*) 48 Geo. 3, c. 47, s. 1.

latter was actual *possession*; but the former, although doubting, did not entirely reject, that interpretation (*m*).

The mere circumstance either of the Crown having been answered the profits of any hereditaments of which the property claimed is parcel, or of the property or the profits thereof having been in charge or stood *insuper* of record, within sixty years, will not now enable the Crown to sue for it after that period has elapsed (*n*). But this is as to property in *England* only.

Answering profits, or being in charge, not now material in *England*.

The Crown, when restrained from alienating the possessions belonging to it, cannot be affected by the Statutes of Limitation applicable to it in any period of time less than that fixed by them (*o*). So the statutes 9 Geo. 3, c. 16, and 48 Geo. 3, c. 47, not repealing those statutes imposing such restraint (*p*), and being, as against the Crown, in the nature of a negative prescription, and, as respects the subject, in the nature of a positive prescription, as prescription is considered and treated in the law of Scotland (*q*), the Crown is not in any degree affected until, by the expiration of the entire period of time fixed by those Statutes of Limitation, the title of the subject is complete (*r*). And although, before the statutes imposing such restraint, and when the Crown had a power to make a grant, such a grant by the Crown might have been presumed (*s*); and although, even since those statutes, and in cases where these Statutes of Limitation do not apply, and no such restraint exists, and in cases between subject and subject (*t*), and even, perhaps, in at least some cases between the Crown and a subject (*u*), such a grant by

Crown not affected unless the full period elapse.

(*m*) *Tuthill v. Rogers*, 1 Jo. & Lat. 86.

(*n*) 24 & 25 Vict. c. 62, ss. 1, 3.

(*o*) See *Goodtitle d. Parker v. Baldwin*, 11 East, 488; *Mill v. The Commissioner of the New Forest*, 18 C. B., N. S. 60.

(*p*) See *Goodtitle d. Parker v. Baldwin*, *supra*.

(*q*) *Ersk. Inst.* 560, s. 8; *ante*,

p. 25.

(*r*) See *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

(*s*) *Roe d. Johnson v. Ireland*, 11 East, 280; *Gibson v. Clark*, 1 Jac. & W. 159; 17 Beav. 366.

(*t*) *Doe d. Devine v. Wilson*, 10 Moo. P. C. C. 502.

(*u*) *Roe d. Johnson v. Ireland*, 11 East, 280.

the Crown may be presumed in favour of a possession against it for twenty years and upwards, but less than sixty years; yet, where these latter statutes do apply, no such grant by the Crown can be presumed, in either class of cases, in favour of a possession of less than sixty years against the Crown (*x*). And no presumption by which the Crown can be barred can be made so long as the land is used in a way which the Crown could not interfere with, and which is consistent with the freehold in the land being retained by the Crown (*y*). And in the cases of those prescriptive rights provided for by the 2 & 3 Will. 4, cc. 71 and 100, all presumption in support of the exercise of them for a less period than that fixed in each case is expressly excluded (*z*).

Whether its
grantee be.

Inasmuch as a grantee of land from the Crown acquires no particular privileges, is not protected against the common law remedies and rights of other persons (*a*), and, in general, is not entitled to the benefit of the prerogative maxim, *nullum tempus occurrit regi* (*b*), it may be a question whether, where a possession has commenced against the Crown, a grantee of the land from the Crown can, after the expiration of twenty years from such commencement, claim at any time during the next forty years (*c*). If not, the title of the possessor, whilst liable to be defeated by the Crown for forty years more, would, as against the grantee at any time after the first twenty years, become absolute.

Sixty years for
the Duke of
Cornwall.

Until the present reign, no Statute of Limitations affecting the Duke of Cornwall in relation to the pos-

(*x*) See *Goodtitle d. Parker v. Baldwin*, 11 East, 488; *Doe d. Devins v. Wilson*, supra.

(*y*) See *Doe d. The Queen v. The Archbishop of York*, 14 Q. B. 81.

(*z*) See sect. 6, c. 71; *Bright v. Walker*, 1 C. M. & R. 211; *Bailey v. Appleyard*, 8 N. & P. 257;

Carr v. Foster, 3 Q. B., N. S. 581; 6 Ex. 828, and sect. 8 of c. 100.

(*a*) *Chitty*, Prerog. of the Cr. 399.

(*b*) *Poph.* 26.

(*c*) See *Doe d. Watt v. Morris*, 2 Bing. N. C. 189; 2 Scott, 276, *S. C.*

sessions of the duchy existed (*d*). At first, this law was applied to the possessions of the duchy in *Cornwall* only, and then with some exceptions (*e*) afterwards, and very recently, to the excepted possessions, and those elsewhere (*f*), but as to the possessions included in the latter statute, subject to the provisions 72 and 75 in the former one.

If before the first of these statutes, and before the Crown, as respects the possessions of this duchy, had been barred of its remedy, and before the subject had acquired a complete title against the Crown, a Duke of Cornwall had come into *esse*, the time which had elapsed against the Crown would not avail against the Duke (*g*); for, as on the Duke coming into *esse*, the estate of the Crown ceases, and that of the Duke arises (*h*), either the right or title acquired against the Crown must cease also, or the time which had elapsed as against the Crown was not to be reckoned against the Duke, or the time ceased to run against him (*i*).

When not affected through the Crown.

The time of limitation prescribed for the Duke of Cornwall, and, when the duchy is vacant, for the Crown also, by the first of these statutes, is also sixty years.

The right or title by reason whereof the Duke or the Crown claims must first accrue within that term, computed from the time next before the commencement of proceedings to recover, or in respect of the property (*k*).

Period, how computed.

The time of limitation in relation to mines of the duchy in *Cornwall* is fixed by special provisions in the first of these statutes.

Mines.

Where any lands, manors, tenements or hereditaments in Cornwall have been held without interruption for sixty years or more before any proceeding in respect

(*d*) Vide ante, Book I. Chap. II. Sect. I.

134.

(*e*) 7 & 8 Vict. c. 105.

(*h*) Ib. Vide ante, p. 253.

(*f*) 23 & 24 Vict. c. 53.

(*i*) See Wightw. 242, 252; *Lambert v. Taylor*, 4 Barn. & C.

(*g*) See *Att.-Gen. v. The Mayor, &c. of Plymouth*, Wightw.

153.

(*k*) 7 & 8 Vict. c. 105, s. 71.

of any mines, minerals, stone or substrata in, upon, under or of any such lands, &c., and substantially worked and gotten at any time during that period by the person who has so held and enjoyed the said lands, &c., and not at any time during that period worked and gotten, or the tolls, dues, royalties and other profits of such mines, &c., have not been received or enjoyed by the Duke or any claiming under him or the Crown, such mines, &c. cannot be sued for (*m*).

Where any lands, manors, tenements or hereditaments in that county have been held or enjoyed by any person without interruption by the Duke, or any person claiming under him, for 100 years before any proceeding in respect of any mines, minerals, stone or substrata in, upon, under or of any such lands, &c., and where such mines, &c. have not been, during that period, "worked and gotten," or the tolls, duties, royalties and other profits thereof have not been received or enjoyed by him or any such person so claiming, such mines, &c. cannot be sued for (*n*).

Reversions and remainders.

In the case of reversions and remainders in the present Duke, those, and any possibility of them in any of his predecessors, on the determination of any limited estate (*o*), and reversions and remainders in property conveyed by him or by any person through whom he claims, for any limited estate in fee simple, or any estate tail, or other particular estate, the right or title first accrues on the possession coming to the Duke or the Crown (*p*).

Expectant on leases.

In the construction of the 9 Geo. 3, c. 16, and of the 24 & 25 Vict. c. 62, as applied to the possessions of the duchy, by the latter statute the right of the Duke and of the Crown to any manors, &c., subject to any lease for years, or for any life or lives, is to be

(*m*) 7 & 8 Vict. c. 105, s. 78.
(*n*) Sect. 74.

(*o*) 7 & 8 Vict. c. 105, s. 76.
(*p*) Sect. 77.

deemed to have first accrued on the determination of such lease, as against any person whose possession or enjoyment of such manors, &c., or whose receipt of the rents, &c. thereof, has commenced during such lease, or who claims under any person whose possession or enjoyment of such manors, &c., or whose receipt of the rents, &c., have so commenced (*q*).

In certain cases arising within the sixty years, the right of the Duke and of the Crown is, by the express terms of the statutes, unaffected: as, firstly, where either of them has been answered, by virtue of that right, the rents, revenues, issues and profits; secondly, where the right or title first accrues to the Duke or to the Crown (*r*); and, thirdly, where in the case of fee farm or other rents out of any of the property of which the estates, rights or interests being defective are established by the first act, such rents have been actually answered and paid to either of them (*s*).

The Duke and the Crown are not to be deemed to have been answered the rents, &c. of any hereditaments which have been held or enjoyed, or of which the rents, &c. have been taken, by any other person for sixty years next before any proceeding for recovering the same, or in respect thereof, by reason of the same having been part of any honour or manor or other hereditament, of which the rents, &c. have been answered to the Duke, or any person under whom he claims, or to the Crown, or which honour or manor or other hereditament has been duly in charge, or stood *insuper* of record (*t*).

In the first instance, the mere circumstance of the property claimed, or of the rents, &c. thereof having been in charge, or stood *insuper* of record within the sixty years, was to preserve the right of the Duke or

Cases within the period when right not affected.

Profits of part not answered, although all in charge.

(*q*) Sect. 4, 24 & 25 Vict. c. 62.

(*s*) Sect. 79.

(*t*) 7 & 8 Vict. c. 105, s. 72.

(*r*) Sect. 76.

the Crown (*u*), but now is not to enable either of them to sue after that period has elapsed (*x*).

As in the statutes in relation to the Crown alone, the subject referred to as being in charge is the rents, revenues, issues and profits, so are they, in these statutes in relation to the duchy of Cornwall, the same subject, but sometimes the property itself (*y*).

Statutes affecting the Crown and the Duke are *in pari materiâ*.

These statutes in relation to the Duke of Cornwall, including the Crown, and the statutes in relation to the Crown alone just noticed, being *in pari materiâ*, and, in their main provisions and substance, in the same terms, and having the same objects, the interpretation generally of each class of these statutes will be the same as the other.

SECTION II.

The Periods of Limitation between Subject and Subject.

Between subject and subject.

The several periods of time fixed for the different subjects to which the Statutes of Limitation are applied, vary with those subjects.

Twenty years for land and rent.

When land or rent, within the meaning of those terms as used in the 3 & 4 Will. 4, c. 27, is claimed either at law (*z*) or in equity (*a*), by any natural person, or by any corporation aggregate, either lay, or spiritual or eleemosynary, the right thereto is to be asserted within *twenty years* next after the time when such right first accrued, subject to extension, however, in certain cases, as will be afterwards shown.

When such land or rent is in mortgage, and is claimed to be redeemed by such persons or corporations,

(*u*) 7 & 8 Vict. c. 105, ss. 71, 75.

(*x*) 24 & 25 Vict. c. 62, ss. 1, 2.

(*y*) See 7 & 8 Vict. c. 105, s. 72.

(*z*) Sect. 2.
(*a*) Sect. 24.

the right must be asserted within *twenty years* next after the time at which the mortgagee obtained the possession or receipt of the profits of the land, or the receipt of the rent comprised in the mortgage, or next after the time at which any acknowledgment, or if more than one, the last of the acknowledgments, of the title of the mortgagor or of his right of redemption, has been given in the mode specified (*b*).

But when such land or rent is claimed, in either jurisdiction, by any spiritual or eleemosynary corporation sole, the right thereto is to be asserted within the period during which two persons in succession have held the office or benefice in respect whereof such land or rent is claimed, and six years after a third person has been appointed thereto, if such period and term together amount to sixty years; and if together they do not amount to this term, then during such further number of years, in addition to such six years, as, with such holding and such six years, will make sixty years, and not at any time afterwards (*c*).

Sixty years
the minimum
for certain cor-
porations.

Formerly, although the right might have accrued to any of these corporations sole, a new right accrued to every successor on his appointment (*d*), and therefore no lapse of time against a predecessor affected a successor. By this provision the period of limitation is reckoned from the time next after that when the right of any such corporation, *or of his predecessor*, first accrued.

Formerly suc-
cessor not
affected by
time against
predecessor.

After the expiration of the statutory period, an invalid exchange of glebe land made before the statute will be valid (*e*).

Where the rent is continuously received by the owner of it from the owner of only a part of the lands charged with it, the right of the claimant of the rent or of his

Effect of re-
ceipt of rent
from owner of
only part of
land.

(*b*) Sect. 28.

Greenlaw v. King, 3 Beav. 49.

(*c*) Sect. 29.

(*e*) See *Thorpe v. Plowden*,

(*d*) Plowd. 375, 537, 538; 14 M. & W. 520; 7 Cl. & F. 137.

predecessor, as against the other lands charged, will not accrue (*d*).

For advowsons
sixty years the
minimum,

When advowsons are claimed in either jurisdiction by any such natural person, or by any such corporation, either aggregate or sole, the right is to be asserted within the period during which three clerks in succession have held the benefice, having obtained possession thereof adversely to the right of the claimant, or of some person through whom he claims, when such incumbencies together amount to *sixty years*, and when they do not amount to that time, then such further time as with those incumbencies will make up that term (*e*).

—one hundred
years the
maximum
time.

When the right is claimed by virtue of any estate, interest or right, which the owner of an estate tail in the advowson might have barred, the claimant is to be deemed to claim through the person entitled to the estate tail, and the right is limited accordingly (*f*). The reason for this appears in *Boswell's case* (*g*).

In no case, however, after the expiration of 100 years from the time when a clerk obtains possession of the benefice adversely to the right of the claimant, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation, or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title (*h*). Here the first period of limitation is neither an absolute term of sixty years, nor such a term irrespective of the number of incumbencies happening within it, but, at the least, *three* incumbencies, successive and adverse, and their minimum aggregate duration that number of years, and if not extending

(*d*) *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. Rep. 264; post, p. 447.

(*e*) Sect. 30.

(*f*) Sect. 32.

(*g*) 6 Rep. 50 a, b.

(*h*) Sect. 33.

over that number, then so many more years as will complete it, whilst the maximum period of limitation in any case is 100 years after the possession has become adverse, irrespective of the number of incumbencies happening within that period.

The benefice must be held during the whole of the prescribed period of limitation adversely to, that is, inconsistent with (*i*), the right of the claimant, and may be either presentative, or, since the 6 & 7 Vict. c. 54, collative, belonging to a bishop, either in right of his see, or in his own right.

The holding must be adverse the whole time.

The difference between presentation and collation is, that the former is a giving and offering of the parson to the church, and makes a plenarty, and the latter is a giving of the church to the parson, and does not make a plenarty (*j*).

Difference between presentation and collation.

Collation is frequently made to benefices presentative, and is either without title, or upon a lapse which happens, first to the bishop, at the end of six months after the vacancy, then to the metropolitan at the end of another six months from the first six, and lastly to the Crown, at the end of another six months from the second (*k*), and whether before (*l*), or upon (*m*), a lapse is an equivocal act. When made before, may be either by right or only provisionally for celebration of divine service until the patron present, and does not affect his possession (*n*), and the possession of the clerk collated is not adverse to the patron (*o*). When made upon lapse is neither a trespass nor an exercise of adverse possession, but the bishop collates either as patron or as attorney of the patron, and the collation is in right of the latter, and an exercise of his possession (*p*).

Collation, when made, and its effect.

(*i*) See *Hardman v. Ellames*, 2 Myl. & K. 732.

(*j*) 1 Leon. 226.

(*k*) Plowd. 498; 1 Inst. 344 b; 2 Ib. 361; 6 Rep. 52; 1 Smythe's Ir. Rep. 517.

(*l*) Co. Litt. 344 b.

(*m*) 4 Cl. & F. 495.

(*n*) 6 Rep. 50 a; Co. Litt. 344 b.

(*o*) Ib.; *Green's case*, 6 Rep. 29; *Boswell's case*, Ib. 49.

(*p*) *Reg. v. Archbishop of York*, 1 Leon. 226; *Meath v. Winchester*, 4 Cl. & F. 445; *London v. Derry*, 1 Smythe's Ir. Rep. 516.

Suppose, said Lord Brougham (*q*), a series of collations by the bishop, each within three months of the avoidance, how would they be referable to the bishop's title, *quasi* attorney of the patron? Would not that have some force in the argument between him and the patron? And Doherty, C. J., said (*r*), a series of them would be evidence, or at least some evidence, of the bishop's right, for as it would be the bishop's interest, so it is always in his power, no matter in what right he really collates, or even if he did so by usurpation, to state that he did so *pleno jure*, for the return is made by the bishop himself.

On lapse, effect
of before and
since 3 & 4
Will. 4, c. 27.

In England, prior to 3 & 4 Will. 4, c. 27, and in Ireland, down to the 6 & 7 Vict. c. 54, no number of collations by a bishop upon lapse ousted the true patron (*s*). And this is still the case until the possession of the benefice has been obtained adversely; and then by these statutes, after the possession has been so obtained, the presentation or collation thereto by reason of a lapse is adverse, but when acquired on a presentation by the Crown on the incumbent being made a bishop, is a continuation of such incumbency (*t*). The principle that the Crown is entitled to present to the benefice, the incumbent whereof has been promoted to a bishopric, extends to the bishopric of Sodor and Man, although not within the realm (*u*). But whether the principle extends to the case where the benefice is in England and the bishopric in Ireland, or the converse, or where the bishopric is founded by the legislature in the East or the West Indies, seems doubtful. The principle, however, does not apply to colonial bishoprics created by the mere prerogative of the Crown (*x*).

Presentation
by the Crown
on promotion
of incumbent
to a bishopric.

(*q*) *Meath v. Winchester*, 4 Cl. & F. 455, 495.

(*r*) *London v. Derry*, 1 Smythe's Ir. Rep. 520.

(*s*) *Reg. v. Archbishop of York*, 1 Leon. 226; *Meath v. Winchester*, 4 Cl. & F. 445;

London v. Derry, 1 Smythe's Ir. Rep. 516.

(*t*) Sect. 31.

(*u*) *The Queen v. Eton Coll.*, 8 Ell. & B. 610.

(*x*) *Ib.*

An advowson collative may be acquired against the rightful patron by adverse collation (*z*), or partly by such collation and partly by presentation for the requisite period. But an advowson presentative, until at least one presentation to it has been made adversely, can be acquired against the rightful patron by adverse presentation only (*a*), and after that presentation collations by lapse will be a continuance of the adverse possession (*b*).

Acquisition of adverse title to advowson collative.

A question may arise whether the possession is adverse, unless each of the clerks be not only instituted, but also inducted, for until induction he has not seisin, and cannot be full incumbent, and the person presenting has not possession of the patronage (*c*). Therefore, if so, and any of the clerks die before induction, the possession of such clerks would not be adverse within the statute, and the times of their holding would not form part of the period of limitation. It may be said, however, that as in the terms of the section the benefice is to be merely *held* by the clerks, that as for all purposes not relating to the temporal possessions of it, it may be held without induction, and that as induction is expressly required of the clerks during whose incumbencies claims under the 2 & 3 Will. 4, c. 100, which is *in pari materia* with the 3 & 4 Will. 4, c. 27, are established, and is not expressly required by the latter statute, the intention of the legislature was that for the purposes of the latter statute induction was not intended.

Whether induction necessary to make each holding adverse.

No possession under any presentation by the Crown, or collation by the ordinary, under the 18 Car. 2 (I.), or the 2 Anne, c. 6 (E.), during the nonconformity of any patron professing the Roman Catholic religion, is adverse within the 7 Vict. c. 54, against the right of

Possession on presentation or collation during nonconformity of papist patrons.

(*z*) 6 Rep. 50 a; Co. Litt. 344 b.

(*a*) Ib.

(*b*) 3 & 4 Will. 4, c. 27, s. 31.

(*c*) *Hare v. Bickley*, Plowd. 526; 6 Co. 49 b; ante, p. 102.

any such patron or his heirs, or any person claiming by, through or under him or them (*e*).

For advowsons of such patrons sixty years from conformity.

The period of limitation for an advowson belonging to a patron professing the Roman Catholic religion, who under the 18 Car. 2 (I.) or the 2 Anne, c. 6 (E.), has lost his right of presentation thereto during his nonconformity to the United Church of England and Ireland, but who within sixty years, either before or after the 10th of August, 1843, conforms to such church, is sixty years from the day of his conformity (*e*).

For next presentations six calendar months.

The right, when merely to present to or to bestow any ecclesiastical benefice on any vacancy thereof, and on such vacancy only, that is, a mere chattel interest (*f*), is regulated by the Statute of Westminster the 2nd (*g*), which, in this respect, is a Statute of Limitations (*h*), and is to be asserted within six calendar (*i*) months next before the teste of the writ (*j*).

If a person wrongfully present, and the presentee be permitted to hold for that period, and before the patron presents (*k*), or if a lapse occur, and a collation is made thereon, the right, whether legal (*l*) or equitable (*m*), except perhaps in the case of donatives (*n*), will be lost. But in the case of a lapse, if the patron present before the bishop exercise his right, the latter loses it (*o*); and if a stranger present before him, and the clerk be instituted and inducted, the patron would lose his right for such turn (*p*).

(*e*) 7 Vict. c. 54, s. 4.

(*f*) See 3 Lev. 47; 4 Leon. 109; Co. Litt. 388 a; F. N. B. 34, n.; 3 Bing. 223; 7 B. & C. 113; 8 Bing. 490.

(*g*) 13 Edw. 1, c. 5.

(*h*) 3 Atk. 453; *Boteler v. Allington*, supra.

(*i*) 2 Inst. 361; 6 Rep. 61; 2 Cro. 166; Yelv. 100; 3 Burr. 1455.

(*j*) Co. Litt. 344 b.

(*k*) 2 Roll. 348; 5 Bing. 174.

(*l*) 13 Edw. 1, c. 5; 6 Co. 48 b; 7 Ib. 28 a; Co. Litt. 344 a.

(*m*) *Boteler v. Allington*, 3 Atk. 453.

(*n*) See *Mutter v. Chancel*, 1 Mer. 475; 5 Russ. 42, S. C.

(*o*) See *Gully v. Bishop of Exeter*, 5 Bing. 171; *Apperley v. Bishop of Hereford*, 9 Ib. 681; *Stone v. Bishop of Winchester*, 9 C. B. 62; 17 Ib. 653.

(*p*) Wat. C. L. 121; Hob. 318.

If, before the 3 & 4 Will. 4, c. 27, an usurpation were made upon a purchaser before any presentation by him, and six months passed and no *quare impedit* were brought, the usurper would have gained the patronage in fee, and the purchaser be without remedy. For, before the Statute of Westminster 2, c. 5, a plenarty for six months had defeated the purchaser perpetually, and he is not within the aid of that statute. He could only have two possessory writs, *quare impedit* and *darrein presentment*, and one writ of right. He could have neither of the two possessory writs, because unable to allege a presentation in himself; and he could not have a writ of right, because he cannot allege seisin in the esplees or profits (*q*). Since the c. 27, which has abolished the writ of *darrein presentment*, and the writ of right of advowson, except in certain cases (*r*), his only remedy from thence to the 10th October, 1860, was by *quare impedit*; but now, where that writ would lie, is by writ of summons, upon which the plaintiff indorses a notice that he intends to declare in *quare impedit*.

Patronage in fee gained by usurpation.

A mortgagee, until foreclosure, is bound to present the nominee of the mortgagor (*s*); and if the mortgagee present his own clerk, a court of equity, on the application of the mortgagor before the institution of such clerk, will order the mortgagee to revoke the presentation (*t*), as, although doubted by the reporter, in that case he may (*u*). After the institution of such clerk the remedy of the mortgagor would be by a bill in equity to remove him, which is in the nature of a *quare impedit*. If the mortgagee present, and his clerk be allowed to remain in possession for six calendar months, equity will not

Advowsons in mortgage.

(*q*) 3 Bulstr. 40.

(*r*) Sects. 36, 37, 38.

(*s*) Cas. temp. Talb. 144; *Macenzie v. Robinson*, 3 Atk. 559; *Gally v. Selby*, 1 Com. Rep. 843.

See also *Croft v. Povel*, 2 Ib. 608.

(*t*) *Jay v. Cow*, Pre. Ch. 71.

(*u*) *Rogers v. Holled*, 2 W. Bl. 1040; 1 B. P. C. 117; Wat. Cler. L. 221.

interfere to displace him, but the mortgagor will be excluded from that turn (*x*).

In the case of an advowson in mortgage, whilst the mortgage title is subsisting, presentations by the mortgagee will not be adverse to the mortgagor under the sects. 30, 31, 32 and 33 of 3 & 4 Will. 4, c. 27.

Incorporeal rights.

Certain incorporeal rights (*y*), after being enjoyed for certain fixed periods without interruption, cannot now be defeated by merely showing their origin, within the time whereof there is no memory of man to the contrary, that is, in law, since the first day of the reign of King Richard the First (*z*), and after their enjoyment for certain other periods are made absolute and indefeasible (*a*).

Profits à prendre partially indefeasible after thirty years ;

A right of common or other profit or benefit to be taken and enjoyed from or upon any land, and that may be lawfully claimed at the common law, by custom, prescription or grant, and has been actually enjoyed by the person claiming right thereto without interruption for *thirty years*, is not to be defeated or destroyed by merely showing the commencement of such right prior to that period, but may be defeated in any other way by which such right is liable to be defeated ; but when it has been taken and enjoyed for *sixty years*, and not by some consent or agreement expressly made or given for the purpose by some deed or writing, is absolute and indefeasible (*b*).

—indefeasible after sixty years.

Easements, &c. partially defeasible after twenty years ;

A way or other easement, or a watercourse, or the use of water, to be enjoyed or derived upon, over or from any land or water, and that may be lawfully claimed, at the common law, by custom, prescription or grant,

(*x*) *Gardiner v. Griffith*, supra.

(*y*) Vide ante, Book I. Chap. II. Sect. IV.

(*z*) Co. Litt. 114 b, 115 a ; 2 Bl. Com. 31 ; *Fisher v. Lord Graves*, 3 E. & Y. 1180 ; *Short*

v. Lee, 2 Jac. & W. 464 ; *Bury v. Pope*, Cro. El. 118. But see *Rez v. Jolliffe*, 2 B. & C. 54 ; *Cross v. Lewis*, Ib. 686.

(*a*) 2 & 3 Will. 4, c. 71.

(*b*) Ib. s. 1.

and has been actually enjoyed by the person claiming right thereto without interruption for the full period of *twenty years*, is not to be defeated or destroyed by merely showing the commencement prior to that period, but may be defeated in any other way by which the same is liable to be defeated; but when taken and enjoyed for the full period of *forty years*, and not by some consent or agreement expressly given or made for the purpose by some deed or writing, is absolute and indefeasible (c). —indefeasible after forty years.

From the periods of thirty years and twenty years respectively fixed by the last statute, however, is excluded the time during which any person, otherwise capable of resisting the claim, has been an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or any action or suit has been pending and diligently prosecuted until abated by the death of any party or parties thereto (d). Times excluded from these periods.

The time so excluded, however, from those two periods is not to be excluded in the two periods of sixty years and forty years respectively (e).

But from the period of forty years is to be excluded the time during which the land or water subject to the claim has been held for life, or for a term of years exceeding three from the granting thereof, in case, within three years next after the end or sooner determination of the term of such holding, the claim be resisted by any person entitled to any reversion expectant on such determination (f).

The enjoyment for the prescribed period must be of a right which can be lawfully claimed, otherwise no user of it, for however long a period, can give it validity. Therefore a right claimed without limit *in alieno solo* (g). The enjoyment must be of right,

(c) 2 & 3 Will. 4, c. 71, s. 2.

(d) Ib. s. 7. See *Bright v. Walker*, supra; *Clayton v. Corby*, 2 Gale & D. 174; *Palk v. Skinner*, 18 Q. B. 568; *Wright v. Williams*, 1 M. & W. 77.

(e) Ib.

(f) Sect. 8. See *Bright v. Walker*, supra; *Wright v. Williams*, supra; *Palk v. Skinner*, supra.

(g) See *Att.-Gen. v. Mathias*, 4 Jur., N. S. 630, and cases there cited.

or which cannot be created by the person against whom it is claimed (*h*), cannot be sustained under this statute.

Showing that the right, when claimed against the Crown, could not be granted by the Crown because restrained from creating it, is not showing only such commencement of it as is not to defeat or destroy it within the statute (*i*).

—and during
the whole
period.

The simple fact of enjoyment is not sufficient to give the right, but the enjoyment must be by a person claiming right thereto, who must show that he does so claim it (*h*), and must be during the whole of the prescribed period, so as to be valid against *all* persons having estates in the *locus in quo*, and unless so enjoyed gives no title against any one (*l*).

Light.

The access and use of light to and for any dwelling-house, workshop or other building, when actually enjoyed with the building for *twenty years* without interruption, and not by consent or agreement expressly made or given for the purpose by deed or writing, is absolute and indefeasible (*m*).

Twenty years.

How acquired.

This right may be acquired by virtue of enjoyment prior to the passing of the act (*n*).

This right is acquired against the owner of a leasehold interest in the servient tenement, and also against all the world, and therefore against the owner of the reversion, and the merger of such interest in the reversion of such tenement leaves the rights of the owner of the dominant tenement unaltered (*o*).

The building with which light and air are to be

(*h*) *Barker v. Richardson*, 4 B. & Ald. 579; *Staffordshire and W. Canal N. C. v. The Birmingham C. N. C.*, 35 L. J., N. S. 757.

(*i*) *Mill v. The Commissioner of the New Forest*, 18 C. B. 60. See also *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

(*k*) See *Gaved v. Martyn*, 19 C. B., N. S. 752.

(*l*) *Bright v. Walker*, 4 Tyrw. 502.

(*m*) Sect. 3. See *Simper v. Foley*, 2 John. & H. 555.

(*n*) Per Wood, V.-C., 2 John. & H. 563.

(*o*) *Simper v. Foley*, 2 John. & H. 555.

“actually enjoyed” need not be occupied, nor even fit for occupation, during the statutory period assigned (*p*).

In all the periods fixed by the last statute all presumption, upon proof of the exercise or enjoyment of the right or matter claimed for any less time or number of years than the periods so fixed, is excluded (*q*).

Presumption from proof of exercise for less period excluded.

This provision is meant only to encounter presumptions from an exercise of the right during such an imperfect period that it was exercised in older times (*r*), and to exclude all presumption or inference in support of the claim from the bare fact of user or enjoyment for less than the prescribed number of years; but when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant (*s*).

The effect of the claim is, that a claimant, proving enjoyment for less than the specified time, shall not, on that ground, carry back his right to a period before that which his proof extends to (*t*).

The enjoyment of the several rights for the respective periods is to be without interruption—not intermission (*u*); but nothing is an interruption within the meaning of the statute unless submitted to, or acquiesced in, for one year after the person interrupted has had, or has, notice both of the interruption and of the person making, or authorizing the making, of it (*x*).

The enjoyment to be uninterrupted.

The sect. 4 speaks of the *party* interrupted. The statute seems to contemplate interruption of the right, not of the period (*y*).

(*p*) *Courtanild v. Legh*, L. R., 4 Ex. 126; 38 L. J., Ex. 45; 17 W. R. 466.

(*q*) Sect. 6. See *Bright v. Walker*, 4 Tyr. 502; *Bailey v. Appleyard*, 3 Nev. & P. 257.

(*r*) Per Lord Denman, C. J., *Carr v. Foster*, 3 Q. B., N. S. 581.

(*s*) Per Lord Westbury, C.,

Hanmer v. Chance, 34 L. J., N. S. 418; 11 Jur., N. S. 397.

(*t*) Per Lord Denman, C. J., *Carr v. Foster*, 3 Q. B., N. S. 581.

(*u*) *Carr v. Foster*, supra.

(*x*) Sect. 4.

(*y*) Per Parke, B., *Flight v. Thomas*, 11 Ad. & E. 699.

What is such enjoyment.

The enjoyment *without interruption* necessarily imports such a user as could be *interrupted* by some one "capable of resisting the claim" (*x*).

Interruptions.

Interruption must clearly mean an obstruction by the act of some other person than the claimant, and not a cessation either by him of his own accord (*y*), or from mere natural causes (*z*), or a cesser or intermission, or anything denoting a mere breach of time (*a*). There must be an overt act indicating that the right is disputed (*b*).

Interruptions within the last twenty years, and subsequent to the right proved to exist long before, will not defeat it, and, when they are made upon only part of the land subject to the right, do not necessarily affect the right upon the remainder (*c*). An interruption within the meaning of the act, to be effectual, must exist for not less than one year, and may be at any time during the period (*d*).

The natural and obvious meaning of the words as to the interruption submitted to, &c. for one year is, that an obstruction shall not be effectual unless the party shall allow it to continue for one year without any act on his part to show that he resists it (*e*); and construing these words according to their plain meaning, it does not follow that an interruption is acquiesced in for a year unless a suit or action be brought within that time, and the year is to be reckoned rather from when the act was done than from when the writ was issued (*f*).

But interruptions acquiesced in for less than a year may be of great weight as evidence on the question, whether there ever was a commencement of an enjoy-

(*x*) Per Cur., *Arkwright v. Gill*, 5 M. & W. 233.

(*y*) Per Patteson, J., *Carr v. Foster*, 3 Q. B., N. S. 581.

(*z*) See *Hall v. Swift*, 4 Bing. N. C. 381.

(*a*) See *Hall v. Swift*, *supra*.

(*b*) Per Williams, J., *Carr v. Foster*, *supra*.

(*c*) *Welooome v. Upton*, 6 M. & W. 536; *Davies v. Williams*, 16 Q. B., N. S. 546.

(*d*) *Flight v. Thomas*, 8 Cl. & F. 231; 7 Q. B., N. S. 275. Per Coleridge, J.

(*e*) Per Mellor, J., *Bennison v. Cartwright*, 5 B. & S. 1.

(*f*) Per Blackburn, J., *Id.*

ment of right. Such interruptions are explanatory of what the user really was (*g*), and may show that the enjoyment never was of right (*h*). The interruption, if submitted to for more than a year from notice of it, but less than that time from a promise given to remove it, will not affect the right (*i*).

Acquiescence must be by the claimant in the act of Acquiescence. another person (*k*).

The 2 & 3 Will. 4, c. 71, abolishes all local customs (*l*). The sects. 1 and 2 are in the negative. The sect. 3 is in the affirmative, but contains the *non obstante* clause (*m*). But this of course would not, even as to light, affect the custom in those cases where an obstruction of the right continues for one year. Abolition of local customs.

As the acquisition of things incorporeal, *quæ in jure consistunt*, is by the mere exercise of the rights, so the loss of them may arise by non-user or non-exercise of them. But during what time, and under what circumstances, the rights will be so lost, no precise rule can be stated. The time and the circumstances may have a different effect according to the nature of the right. Length of non-user to affect these rights.

The periods of limitation fixed by the 2 & 3 Will. 4, c. 71, are only for the establishment of rights which may be lawfully acquired at the common law, by custom, prescription or grant. But such rights may be lost, not, however, under legislative provision, or in general by the acquisition of them by one person against another, as in the case of corporeal hereditaments, or of tithes, or of rent, under the 2 & 3 Will. 4, c. 27, and independent of the owner of the property subject to such rights, though sometimes they may be so lost (*n*), but Effect of 2 & 3 Will. 4, c. 71, on these rights.

(*g*) Per Lord Denman, C. J., 17 Q. B., N. S. 274.

(*h*) Per Coleridge, J., *Ib.* 275.

(*i*) *Gale v. Abbot*, 8 Jur., N. S. 987.

(*k*) See 3 Q. B., N. S. 587.

(*l*) 1 L. R., Ch. A. 299.

(*m*) See *Salters' Co. v. Jay*, 3 Q. B. 109; *Truscott v. Merchant Taylors' Co.*, 11 Exch. 855.

(*n*) See *Rogers v. Brooks*, 1 T. R. 431, n.

by the servient tenement becoming discharged from such rights for the benefit of the owner of it on their extinguishment by non-user, or by unity of possession (*o*), or even merger (*p*). The nature and extent of the non-user which will produce this extinguishment has been already considered (*q*).

For moduses
and exemptions
from tithes,

The periods of limitation for prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, are the following, and vary with the person or persons making the claims.

—in certain
cases, thirty
years;

Where the render of tithes in kind is demanded by any lay person not being a corporation sole, or any corporation aggregate, either temporal or spiritual, the claim is to be valid, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of exemption or discharge showing the enjoyment of the land without payment or render of tithes, money or other matter in lieu thereof, for *thirty years* next before the time of such demand; unless, either in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quantity or quality, from the *modus* claimed, or, in the case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, be shown to have taken place prior to that period, or proof be given that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for the purpose by writing; and if such proof be extended to *sixty years* next before the time of such demand, and such payment or render be not made or enjoyment not had by some express agreement in

—in others,
sixty years.

(*o*) See Gale on Easements, *passim*; *Simper v. Foley*, 2 John. & H. 555.

(*p*) See *Earl of Carnarvon v. Villebois*, 13 M. & W. 313.

(*q*) Vide Book III. Chap. V.

writing for the purpose, the claim is to be absolute and indefeasible (*r*).

Where such render is demanded by any corporation sole, either spiritual or temporal, every such prescription or claim is made absolute and indefeasible upon evidence showing such payment or render of *modus* made or enjoyment had, as before mentioned, applicable to the nature of the claim, during the time two persons in succession have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution "*or*" induction of a third person thereto; but if the whole time of such holding be less than sixty years, then during such further number of years, either before or after, or partly before and partly after, such holding, as with it will make *sixty years*, and also during *three years* after the appointment and institution "*or*" induction of a third person to the same office or benefice, unless there be proof that the payment or render of *modus* was made, or enjoyment had, by some such consent or agreement as in the former case (*s*).

On render of tithes claimed by corporations sole, not less than sixty years.

From the periods fixed by this last statute, however, is excluded the time during which the lands or tenements have been held or occupied, either by any person entitled to the tithes thereof, or by any lessee of any such person, or by any person compounding for them with any such person so entitled, or by any tenant of any such person, or of any such lessee or compounder, whereby the right to such tithes may have been, or may be, during any time in the occupier of the lands or tenements, or in the person entitled to the rent thereof (*t*).

What periods excluded.

From the period of thirty years fixed by the same statute is also excluded the time during which either any

(*r*) 2 & 3 Will. 4, c. 100, s. 1.

(*t*) Sect. 5.

(*s*) *Ib.*

person, otherwise capable of resisting the claim, is an infant, idiot, *non compos mentis*, feme covert or lay tenant for life, or any action or suit has been pending and diligently prosecuted until abated by the death of any party or parties thereto (*u*). But the time excluded as last mentioned is not excluded from the other periods of limitation prescribed by this statute (*x*).

Presumption.

In all the periods fixed by this last statute, all presumption upon proof of the exercise or enjoyment of the right or matter claimed, for any less time than those periods, is excluded (*y*).

Differences in the periods where the rights are made defeasible, and where made indefeasible.

Here, also, as in the first period of limitation for advowsons, the period of limitation, when the right is claimed as absolute and indefeasible, is neither an absolute term of years, nor such a term, irrespective of the number of persons who have held the office or benefice in respect whereof the render of tithes in kind is claimed, but during the time of the holding of it by at least *two* persons, and a term of three years during the holding by a third person, yet so that the *minimum* of the aggregate holdings be sixty years; and when such holdings have been for a less number of years, then during such further number, either before the commencement or at the end of such holdings, as will complete that term, and during a further term of three years of the holding by a third person.

Whether induction of corporation sole to office or benefice necessary.

The three years of the holding of a third person is to be after his "appointment and institution *or* induction to the office or the benefice;" as if, said Coleridge, J. (*z*), institution and induction were synonymous or contemporaneous. Pollock, C.B., however (*a*), considered "or" to be an inaccuracy or misprint, and ought to be "and." The same terms are used in the statute for

(*u*) Sect. 6.

(*x*) *Ib.*

(*y*) Sect. 8.

(*z*) *Fellows v. Clay*, 4 Q. B. 313, 321.

(*a*) *Salheld v. Johnson*, 2 Ex. 256, 280.

Ireland on the same subject (*b*). But some offices are presentable (*c*), and others are collative (*d*), and although to be held by a spiritual person, who is collated and instituted, but not, as in the case of a benefice, necessarily inducted, may be *sine curâ animarum*, and therefore lay foundation (*e*). May not, therefore, these terms be taken *reddendo singula singulis*, the appointment and institution applying to offices only, and induction to benefices only? The intention of the legislature, in relation to benefices, would seem to be, that the right claimed ought not to be absolute and indefeasible, unless the benefice be held during the whole period of limitation prescribed, by persons who, for all purposes, temporal as well as spiritual, have full and complete possession of the benefice; and to give them such possession, induction, which is a corporal possession, is essential (*f*).

The object of the statute is to prevent, after an enjoyment of the land for the prescribed period, paying or rendering the modus, or exempt from or discharged of tithes, the modus, or the exemption or the discharge from being defeated by mere parol evidence of an express agreement that it was for a limited period only, and after the payment or the enjoyment for such period, *as of right*, to confer on the owner of the land a title to hold it subject to only such payment, or so exempted or discharged (*g*).

Object of 2 & 3 Will. 4, c. 100.

Non-payment of tithes in kind is to be shown for the required number of years; so that if a positive non-payment of them for the full thirty or sixty years were shown, that would be conclusive evidence for all time within that period. If, therefore, the payment of a

For what time non-payment of tithes to be shown.

(*b*) 1 & 2 Vict. c. 109, s. 18.

(*c*) Co. Litt. 342 a.

(*d*) See *Att.-Gen. v. St. Cross Hospital*, 17 Beav. 435; *Att.-Gen. v. Ewelme Hospital*, Ib. 366.

(*e*) Ib.; *Rennell v. Bishop of*

Lincoln, 7 B. & C. 189; *Mirehouse v. Rennell*, 8 Bing. 551.

(*f*) *Hare v. Bickley*, Plowd. 526; *supra*, p. 102.

(*g*) *Tymbee v. Brown*, 3 Ex. 117.

modus sixty years ago be proved, but be not proved in the fifty-eighth year, the claim would not necessarily fail; but if the proof extended over only the last fifty-nine years it would not do (*h*).

Effect of enjoyment of exemption by consent.

If at any time during the prescribed period such enjoyment of the land has been by consent or agreement in writing expressly made or given for the purpose, the render of tithes in kind may be still demanded. But the consent must be to the payment or render of the very modus, or to the exemption or discharge, during all or some part of the period, and that by some person or persons who could otherwise have objected to the payment or render, or exemption or discharge; for by the words of the statute such payment or render, or enjoyment, that is, the payment or render, or the enjoyment for the statutable period, must be made by consent in writing expressly given for the purpose, and who was also one or more of the persons who held the office or benefice, and not merely by a person who had held the same prior to the time when such period commenced (*i*).

Evidence of the consent.

The evidence of the consent or agreement is to be, not merely parol, but written, which cannot be open to mistake, and may be either by deed or by a less formal instrument; and an answer to a bill in equity by the owner of the land during the prescribed period to establish the agreement against one of the persons who, during that period, held the office or benefice in respect whereof the render of tithes in kind might be claimed, and who signed and swore to such answer, might perhaps be sufficient evidence (*k*).

The Tithe Commutation Act (*l*) does not interfere with this statute of the 2 & 3 Will. 4, c. 100 (*m*).

For money

The period of limitation for sums of money secured

(*h*) See *Earl of Stamford v. Dunbar*, 18 M. & W. 827.

(*i*) *Twymdee v. Brown*, 3 Ex. 117.

(*k*) See *S. C.*

(*l*) 6 & 7 Will. 4, c. 71, s. 49.

(*m*) See 4 Q. B. 359.

by mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, and for any legacy (*n*), is *twenty years* (*o*), and not beyond by reason only of the person, or some of the persons, claiming being, when the cause of action accrues, beyond the seas (*p*). This section of this last statute, like sect. 14 of it (*q*), is retrospective, and is intended to prevent actions thereafter to be brought, whether on past or future transactions (*r*).

charged on land, and legacies, twenty years.

In the case of a mortgage of an interest in land the twenty years may elapse, and by the sect. 24, as respects such interest, and by the sect. 40, and the chap. 42, or either of them (*s*), as respects the money, the right of the mortgagee may be barred, and yet, by reason of the nature of such interest, he may obtain the payment of his mortgage money out of such interest. Thus where a legacy, charged on land and payable on the death of a tenant for life, was assigned by way of mortgage, and no part of the principal, nor any interest, was paid, nor any acknowledgment of the right of the mortgagee was given within twenty years from the mortgage, and the representative of the mortgagor claimed the payment of the legacy as against the mortgagee, on the ground that the mortgage debt was barred, the court held that, on the death of the tenant for life, the mortgagee would be entitled to claim the legacy within twenty years from such death, which had not elapsed, and dismissed the claim (*t*).

Where a mortgagee may obtain payment after twenty years.

If, in the case of judgments, by the operation of marshalling of assets, simple contract creditors become entitled to stand in the place of a judgment creditor, and thus, as to the assets of the debtor, acquire the right of

Whether by marshalling, simple contract creditors may have same time as judgment creditors.

(*n*) Vide supra, p. 387.

(*o*) 3 & 4 Will. 4, c. 27, s. 40.

(*p*) 19 & 20 Vict. c. 97, s. 10.

(*q*) *Thompson v. Waithman*, 3 Drew. 628. See also *Seager v. Aston*, 3 Jur., N. S. 481.

(*r*) Per Lord Campbell, C. J., 8 Ell. & B. 437.

(*s*) See *Forryth v. Bristowe*, 8 Ex. 716.

(*t*) *Seager v. Aston*, supra.

having their claims satisfied out of those assets of the debtor which, independently of that operation, could be reached by a judgment creditor only, those simple contract creditors, like the judgment creditor, will not be deprived of their claims by the lapse of a less period of time than twenty years (*u*).

The actual question decided in *Vickers v. Oliver*, however, has been the subject of a diversity of judicial opinion. Some observations upon the case were made by the court in *Busby v. Seymour* (*v*), which, in *Ellard v. Cooper* (*x*), was contended to be opposed to *Vickers v. Oliver*. But the court, in *Ellard v. Cooper*, said the cases were not in conflict; that *Vickers v. Oliver*, considering the ground on which the right of marshalling stands, namely, the substitution of the simple contract creditors for the specialty creditors, was rightly decided; and that, referring to the dates of the facts of *Busby v. Seymour*, even a specialty creditor, at the time when the claim was first asserted against the real estate, would have been barred by lapse of time.

But in *Fordham v. Wallis* (*y*), Turner, V.-C., said, that upon examining the case of *Vickers v. Oliver*, the judgment will be found not at all to bear out the marginal note as to the simple contract creditor not being barred by the lapse of less than twenty years; that the case in *Busby v. Seymour* was referred to the true ground on which, by the judgment, it was rested; that he could find no authority for saying that the court would marshal assets at the instance of a plaintiff whose immediate right against the real estate is barred by the Statute of Limitations; that simple contract creditors have now a direct right against the real estate, in case of a deficiency of the personal, and do not require the aid of the court to marshal the assets in order to give them a

(*u*) *Vickers v. Oliver*, 1 You.
& C. C. C. 211.

(*v*) 1 Jo. & Lat. 527.

(*x*) 1 Ir. Eq. Rep., N. S. 376.
(*y*) 10 Hare, 217.

remedy against the real estate; that for whatever purpose the doctrine of marshalling may be necessary to be kept on foot, he did not think it ought to be kept alive for the purpose of giving indirectly a right which could not be asserted directly; that the consequence would be, that, in all cases where there are any specialty debts, the simple contract creditors would be entitled to sue the real estate at any time within which the specialty creditors could have sued; in effect, to create in equity the same limitation as to simple contract debts, as the statute has prescribed as to specialties, and that this probably was the point to which the observations upon *Vickers v. Oliver* in *Busby v. Seymour* were addressed.

The period of limitation for arrears of dower, and damages on account of such arrears, is *six years* (z), and, as in the case of the last period, not beyond, by reason only of the person or some of the persons claiming being, when the cause of action accrues, beyond the seas (a).

Arrears of dower and damages for them, six years.

In point of time there was not, in general, prior to the 3 & 4 Will. 4, c. 27, in relation to arrears of dower, or to damages for such arrears, any limitation, and a court of equity would give her profits from the time, not only of her demanding, which is the time she is to have it in her writ of dower (b), but from the time of her title accruing (c).

Damages for arrears of dower were given to doweresses by the Statute of Merton (d), from the death of the husband to the day whereon, by judgment, they recover seisin of their dower, and in *quare impedit* by the Statute of Westminster the 2nd (e).

(z) 3 & 4 Will. 4, c. 27, s. 41.

(a) 19 & 20 Vict. c. 97, s. 10.

(b) *Dobson v. Dobson*, supra;
Watson v. Watson, supra.

(c) Per Lord Hardwicke, 3
Atk. 181; *Mundy v. Mundy*, 2

Ves. Ir. 122; *Oliver v. Richardson*, 9 Ib. 222 (12 years); *Curtis v. Curtis*, 2 B. C. C. 620, 632.

(d) 20 Hen. 8, c. 1. See 2 Inst. 80.

(e) 18 Edw. 1, c. 5.

How affected
by 3 & 4 Will. 4,
c. 42.

Although, however, the 3 & 4 Will. 4, c. 27, fixed the limitation of time for damages on account of arrears of dower to six years, yet the subsequent statute of the same session (*f*) enacts that all actions for damages given by any statute then or thereafter in force, shall be commenced and sued within *two years* after the cause of action or suit, but not after. This statute, however, applies to *England* only. A similar enactment for *Ireland* was not passed until 1853 (*g*).

Difference of
effect between
c. 27 and c. 42.

A difference in the effect of the chap. 42 upon the chap. 27 is, that by the chap. 42, the later statute, in cases like *Paget v. Foley* (*h*), and *Strachan v. Thomas* (*i*), arrears of rent on specialties are recoverable for a longer period, and damages given by any statute are recoverable for a shorter period than by the chap. 27, the earlier statute. In other words, in the former case, the chap. 42 has an enlarging, in the latter case a restrictive, operation. If, however, the principle of the distinction stated as involved in these two decisions, between the effect of these enactments in relation to the land and to the person (*k*), be adopted, then the period of limitation for these arrears is, as to the land, six years, but as to the person, two years.

Arrears of
rent, &c., and
damages for
them, six
years.

The period of limitation for arrears of rent, of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, and damages in respect of such arrears of rent or interest, the rent being rent within the meaning of that term as used in the sect. 1 of 3 & 4 Will. 4, c. 27 (*l*), is six years (*m*), and not beyond, by reason only of the person, or some of the persons claiming being, when the cause of action accrues, beyond the seas (*n*).

(*f*) 3 & 4 Will. 4, c. 42, s. 3.

(*g*) 16 & 17 Vict. c. 113, s. 20.

(*h*) 2 Bing. N. C. 679.

(*i*) 12 Ad. & E. 536.

(*k*) *Hunter v. Nookolds*, 1

Macn. & G. 640.

(*l*) Vide ante, Chap. III. of this Book.

(*m*) Ib. s. 42.

(*n*) 19 & 20 Vict. c. 97, s. 10.

But where any prior mortgagee or other incumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit is brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover the arrears of interest becoming due during the whole time that such prior mortgagee or incumbrancer was in possession or receipt as aforesaid, although such time exceed six years (*o*). This is a very reasonable provision (*p*), inasmuch as no laches could be imputed to the mortgagee, who was unable to gain possession by reason of a prior incumbrancer being in possession, it was thought unjust to limit such mortgagee to six years of arrears; and he was enabled, therefore, to recover all the arrears which became due during the time that possession of the land was held by the prior mortgagee. No doubt the exception is a very just one; but the reason of that exception is this, that when a prior mortgagee was *bond fide* in possession, then that possession excluded the subsequent mortgagee from being enabled to recover rents, or to recover lands, or to enter into possession (*q*).

Where a prior incumbrancer has been in possession.

Where a mortgagee enters within six years after an acknowledgment to a prior mortgagee, who postponed his mortgage to that of the mortgagee so entering, the statute cannot operate against the latter mortgagee, but his right to interest is protected by the provision (*r*).

The meaning of the proviso in sect. 42 is, that the possession of the prior incumbrancer shall not bar the subsequent incumbrancer from the arrears which accrued during the time of such possession, though it exceed six years (*s*). The first clause in sect. 42, and the proviso

Meaning of proviso in sect. 42 of c. 27.

(*o*) Sect. 42.

(*p*) 1 Con. & L. 516.

(*q*) *Chinnery v. Evans*, 11 H. L. C. 115, 136.

(*r*) *Jortin v. S. E. Railway*

Company, 6 De Gex M. & G. 270.

(*s*) *Scott v. Nison*, 2 Con. & L. 268; *Henry v. Smith*, 1 Ib. 516.

in the same section, are *in pari materiâ*, and it is no sufficient reason for construing them differently that the last has some words which are wanting in the first (*t*). Therefore the express mention of mortgages in the proviso is to be construed so as to include them in both branches of the section (*u*). So, also, as in the first clause of this section, charges on rent as well as on land are expressly mentioned, and in the proviso land only is mentioned as the subject of the charge; and as in the sect. 40, which is also *in pari materiâ*, rent as well as land is mentioned as the subject of charge, the proviso in the sect. 42 may also include charges upon rent. This provision, however, has been said not by any means adequately to provide for the various cases for which, where there are several mortgagees [mortgages?] upon the same estate, provision was necessary, and was obviously meant to be made (*x*).

When applicable.

Although the claimant of arrears subject to prior incumbrances do not enforce every equitable right he has, he is still entitled to the benefit of this exception. Therefore, where an equitable annuitant, to whom priority over a legal charge had been given, but whose annuity was still subject to the possession of a person under a legal right derived under a prior title, preventing the annuitant from either recovering the possession or distraining, did not file his bill to enforce his charge, he was held entitled to more than six years' arrears (*y*).

When inapplicable.

This section does not apply where the legal holder of a defunct or satisfied charge or incumbrance, or of an existing charge or incumbrance, is not himself actually in possession, or in receipt of the rents and profits, but where an individual is in that possession, or in that actual receipt, who is entitled, by a trust declared in

(*t*) 3 Ad. & E. 895.

(*u*) See *Henry v. Smith*, 1 Con. & L. 506; *Bolding v. Lane*, 8 Giff. 561, 574.

(*x*) Per Wigram, V.-C., *Du Vigier v. Lee*, 2 Hare, 383.

(*y*) *Drought v. Jones*, 2 Ir. Eq. R. 303.

equity, to the benefit of that outstanding charge or incumbrance (*z*); nor to the case of a tenant for life and a remainderman, where the estate for life is not, and the remainder is, bound by a judgment (*a*).

Although in equity, before the 3 & 4 Will. 4, c. 27, a charity was not barred by the Statute of Limitations, 21 Jac. 1, c. 16, yet in directing an account of rents in favour of a charity, the Court, in general, adopted the period fixed by that statute in matters of account, six years, as a rule in determining the period over which the account should be extended (*b*), especially when the question was what was the effect and true construction of the instrument under which the trust was created (*c*).

If, indeed, the rents of the charity property clearly appeared to have been received by persons to whom they clearly did not belong, the account would not be for a shorter period than the strict right demanded (*d*). In one case, indeed (*e*), an account for a period of 200 years was directed; but the defendants, by their answer, submitted to account generally, and stated that the amount received by the corporation would appear from their books, and that they had always been willing to account. And in *Attorney-General v. Brewers' Company* (*f*), an account of rents for a period of thirty-seven years was directed.

As turnpike tolls are not land within the meaning of the section 1 of the last statute (*g*), arrears of interest for a sum charged on such tolls are not within this period of limitation of six years (*h*).

Arrears of
rents of charity
lands.

Not arrears of
interest on
mortgage of
turnpike tolls.

(*z*) *Chinnery v. Evans*, 11 H. L. C. 115, 136.

(*a*) *Vincent v. Gonig*, 1 Jo. & Lat. 697.

(*b*) 2 Eq. Ca. Ab. 12; Jac. 446; *Att.-Gen. v. Mayor, &c. of Coventry*, 2 Vern. 397, cit. 2 Jac. & W. 321; *Att.-Gen. v. Mayor of Bristol*, 8 Mad. 319; 2 Jac. & W. 321.

(*c*) 2 Jac. & W. 321.

(*d*) *Att.-Gen. v. Bowyer*, 3 Ves. 729.

(*e*) *Att.-Gen. v. Mayor, &c. of Exeter*, *supra*.

(*f*) 1 Mer. 495.

(*g*) Vide *sup.* Chap. III. of this Book.

(*h*) *Mellish v. Brooks*, 3 Beav. 22.

In spiritual
courts.

The period of limitation for tithes, as a chattel (*i*), legacies, or other property which may be recovered at law or in equity, is *the same* in any *spiritual Court* as at law or in equity (*k*).

SECTION III.

The several Termini from whence the Different Periods of Limitation are to be computed.

Period for
land or rent
commences
from the first
accruer of the
right.

The several *termini* from whence the different periods of limitation stated in the last Section are to be computed, especially in relation to the subjects to which the 3 & 4 Will. 4, c. 27, is applied, are various.

Where the right to land or rent is claimed at law, the twenty years are computed from the time when the right to recover first accrues, either to a person through whom the claimant claims, or to the claimant himself, and not generally from the cause of action or suit, as in the 3 & 4 Will. 4, c. 42, s. 3 (*l*).

Sometimes
before.

In some cases as to land, in the case of rent, and also in some other cases, the statute makes the time of limitation to begin from a time before the right to recover has accrued (*m*).

The provisions
of c. 27 regu-
lating this.

The various cases in which the right is to be deemed to have first accrued generally, and, under certain circumstances, with respect to the nature of the estate or interest in the property claimed, are specially provided for by the section 3, the six next following sections, and the section 15; and the object of these sections is to explain and give a construction of the enactment contained

(*i*) Vide Chap. III., Sect. II. of this Book.

(*k*) 3 & 4 Will. 4, c. 27, s. 48.

(*l*) *Sandars v. Coward*, 15 M. & W. 48.

(*m*) 16 M. & W. 565; 5 Ex. 181; 9 Q. B. 358.

in the section 2, as to "the time at which the right shall be deemed to have first accrued," but only in those cases in which doubt or difficulty might occur, leaving every case which falls plainly within the general words of the 2nd section, but is not included amongst the instances given by the 3rd, and these other sections, to be governed by the operation of the 2nd (*n*), and the cases specified are not merely by way of illustration, but determine, in those cases, the point of time from which the time limited by the section 2 is to be computed (*o*); and in all other cases, not so specified, the time when the right accrues is to be determined according to the nature and circumstances of the case.

Where the claimant, or some one through whom he claims either as heir, issue in tail, tenant by the curtesy of *England*, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, or as lord by escheat (*p*), has been, in respect of the estate or interest claimed, in possession or in receipt of the profits of the land, or in receipt of the rent, and while entitled thereto has been dispossessed, or has discontinued such possession or receipt, the right first accrues at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (*q*).

Dispossession, or discontinuance of possession.

The words dispossession or discontinuance of possession here used are applicable, not to rent, but to land only (*r*).

But of land only.

Dispossession means the actual ouster or expulsion of a person having a right to the possession (*s*).

Dispossession, what.

The withholding of tithes by the occupier of land, if

(*n*) 3 Bing. N. C. 553. See also 2 Ib. 513; 3 Ir. L. R. 463.
(*o*) 2 Bing. N. C. 515.
(*p*) Sect. 1.

(*q*) Sect. 3.
(*r*) 16 M. & W. 564; 5 Ex. 178. See also sects. 10, 11.
(*s*) See 10 C. B. 84.

the non-render of them be within the 3 & 4 Will. 4, c. 27, would not be dispossession (*t*).

Discontinu-
ance of pos-
session, what
is.

Discontinuance of possession means the quitting possession of land to the possession of which the person quitting was entitled, analogous to dispossession—the ceasing to possess when he had a right to possess (*u*), followed by the actual possession of another person.

To constitute the discontinuance, there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected (*v*). Thus a husband and wife in possession of land, and seised in fee in her right, the husband being also tenant by the curtesy initiate (*x*), quitting, and for forty years (*y*) remaining out of possession, which is taken and continued by another person, is a discontinuance of possession, and operates an absolute bar (*z*).

What not.

But a tenant in tail, executing a conveyance by a feoffment, operating a discontinuance of the estate tail, ceases to be entitled to the land conveyed, and cannot therefore be said to have discontinued his possession *while entitled thereto* within the section 3 (*a*).

The discontinuance by a landlord of the receipt of rent from his lessee is not a discontinuance of possession by him, for until the expiration of the lease there is no right to the possession (*b*).

The relinquishment of the possession of the estate of a wife by her and her husband to a stranger, on the conveyance of the husband, is not a discontinuance of the possession within this section (*c*), as the relinquishment

(*t*) See *Lord Shannon v. Hodder*, 2 Ir. L. R. 223, n.

(*u*) *Cannon v. Rimington*, 12 C. B. 1; *Austin v. Llewellyn*, 9 Ex. 276.

(*v*) *M^cDonnell v. M^cKinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Ex. 562; *Poole v. Griffith*, on error, 15 Ir. C. L. R. 277.

(*w*) Co. Litt. 80 a.

(*y*) Sect. 7.

(*z*) *Doe d. Corby v. Branston*, 8 Ad. & E. 63.

(*a*) *Cannon v. Rimington*, 12 C. B. 1.

(*b*) *Doe d. Davy v. Owenham*, 7 M. & W. 131. See also *Grant v. Ellis*, 9 Ib. 113.

(*c*) *Jumpson v. Pitchers*, 13 Sim. 827.

without any such conveyance or any contract for the purpose would be (*d*).

Where the discontinuance of possession is by one person, the period of limitation is computed from the taking of the possession by another, and as well in the case of quarries (*e*) and mines (*f*), as of the surface of land (*g*). Where there has been no possession, there can be no dispossession, of land, and no receipt, there can be no discontinuance of the receipt, of rent, under the sect. 3; but yet, under the sect. 2, the period of limitation will be computed from the time when the claimant was entitled to the possession or to the receipt (*h*).

The twenty years, in the case of rent, must always be from the last actual receipt of it, and not at the option of the claimant, from the time when the receipt was discontinued (*i*).

Discontinu-
ance of receipt
of a rent.

The receipt of a fee farm rent charged on lands from the owner of only part of them, is no discontinuance of the receipt of the rent as respects the other part of the lands, so as to preclude the owner of the rent from recovering it from the owner of such other part; and before the rent can be presumed to be extinguished, the non-payment of it out of any part of the lands charged with it must be shown. The mere fact of its not having been demanded from the owner of, or having been levied out of only one part, affords no evidence that it was not levied out of the other part of the lands, and the persons entitled to the rent would, by proving payment out of any of the lands charged with it down to a time within the period of limitation, be entitled to resort to

(*d*) *Doe d. Corbyn v. Branston*,
supra.

(*e*) *M'Donnell v. M'Kinty*, 10
Ir. L. R. 514.

(*f*) *Smith v. Lloyd*, 9 Ex. 562.

(*g*) *Tottenham v. Byrne*, 12

Ir. L. R. 376; *Poole v. Griffith*,
15 Ib. 239.

(*h*) *James v. Salter*, 2 Bing.
N. C. 505; 8 Ib. 544.

(*i*) 16 M. & W. 547; 5 Ex. 166.

any part of the lands, although, having had it paid by others, they did not resort to a part of the lands (*j*).

On abatement. In cases of abatement (*k*), that is, when the claimant claims the estate or interest of a deceased person, who continued in the possession or receipt in respect of the same estate or interest until his death, and was the last person entitled to such estate or interest who was in such possession or receipt, the right of the heir or devisee first accrues on the death of such deceased person (*l*).

The right of the heir or the devisee is barred, on the expiration of twenty years computed from the last actual receipt of rent by the ancestor or testator. Rent merely becoming due to him in his lifetime, and within twenty years before the commencement of an action or suit by the heir or devisee, but never paid, does not preserve the right of the latter (*m*).

On alienation. In cases arising on alienation, that is, when the claimant claims in respect of an estate or interest in possession assured by any instrument other than a will, to him, or to one through whom he claims, as just noticed, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument has been in such possession or receipt, the right first accrues when the claimant, or the person through whom he so claims, was entitled to such possession or receipt by virtue of such instrument (*n*).

By lease. A lessee entering into possession of only part of the demised premises, and paying the full rent for all, but never in any way entering into the possession, or into

(*j*) *Warren v. Bateman*, Flan. & K. Ir. R. 448; *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. R. 264.

(*k*) See Co. Litt. 277 a; 3 Bl.

Com. 167, 168.

(*l*) Sect. 3.

(*m*) *Baines v. Lumley*, 16 W. R. 674.

(*n*) Sect. 3.

the receipt of the profits of the remainder, loses, at the end of twenty years from the commencement of the lease, as against the person then in possession of the remainder, who did not come in under, or in privity, with either the lessor or the lessee, the right thereto, notwithstanding the pendency of, or the possession of the other premises under, or the payment of the rent reserved by, the lease (*o*).

The case of a *cestui que trust* holding possession of land under the trustee does not fall within this clause, which is meant to apply to cases where the person holding the land does not hold it under, or in privity with, the person in whom the right of entry is supposed to be. The *cestui que trust* in such case holds possession under the trustee, and under the protection of the instrument by which the estate is conveyed to the trustee. It cannot, therefore, be said, that it is a case in which "no person entitled under the instrument" has been in possession, for the *cestui que trust* has virtually been in possession under the instrument (*p*).

When not, on conveyance in trust.

Whether it was necessary for a mortgagee, not taking possession of the property mortgaged, to bring his action within twenty years from the day of default in paying the mortgage money, independent of payment of interest or principal, was doubted in *Doe d. Jones v. Williams* (*q*). *Dearman v. Wyche* (*r*) seems to have been considered as decided on the ground of adverse possession, or at least as not decided on the doctrine of non-adverse possession (*s*). The consequence of this doubt, if well founded, was considered alarming to mortgagees, and hence (*t*) the statute 1 Vict. c. 28.

On a mortgage without possession.

The immediate evil contemplated by this statute was, 1 Vict. c. 28. that the c. 27 might be held to run from default in pay-

(*o*) See 15 Ir. L. R. 270.

(*p*) *Garrard v. Tuck*, 8 C. B. 231.

(*q*) 5 Ad. & E. 291.

L.

(*r*) 9 Sim. 570.

(*s*) 2 Con. & L. 150.

(*t*) 2 Hare, 332; 10 Ir. L. R., N. S. 352.

ment of the mortgage money, though the interest might have been paid for nineteen years afterwards, although perhaps applicable to other cases (*u*); and the object of the later statute appears to have been to make mortgages an available security, where they were good and valid in their inception, and the mortgagee, having received payment of his interest, cannot be charged with any laches (*x*), and to preserve in the mortgagee the right to make an entry, and bring an ejectment to recover lands, the language of the 40th section of the earlier statute being confined to cases of recovery of the money (*y*).

Who a person claiming under a mortgage within.

A purchaser of land from the mortgagor paying the principal and interest to the mortgagee, and taking his conveyance from mortgagor and mortgagee, is a person claiming under a mortgage within 1 Vict. c. 28, and is not barred of his title under the sect. 2 of the c. 27, until the expiration of twenty years from such payment (*z*).

Interest paid out of part of the estate.

If a mortgage comprise different estates, and the interest on the mortgage is paid out of the rents of only one of the estates, and the others are conveyed to a purchaser for value, the right of the mortgagee as against the other estates will first accrue on the last of such payments of interest (*a*).

Mortgage before, and interest paid after, time of limitation expired.

If after the possession has been acquired against the owner, but before the time of limitation has expired, he mortgage the property, and continue to pay the interest until after the time expire, the mortgagee will not be barred, and may recover against the person in possession (*b*).

(*u*) Per Lord Campbell, C. J., 17 Q. B. 377.

(*x*) 17 Q. B. 371; 10 Ir. L. R., N. S. 351.

(*y*) *Chinnery v. Evans*, 11 H. L. C. 115, 133.

(*z*) *Doe d. Baddeley v. Massey*,

17 Q. B. 373.

(*a*) *Chinnery v. Evans*, 11 H. L. C. 115; *Musherry v. Chinnery*, 9 Ir. Eq. R., N. S. 94.

(*b*) *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Ford v. Ager*, 2 Hurl. & C. 279.

But the owner, after he is barred, cannot, by making a mortgage, and paying interest, vest in the mortgagee a right of entry which he could not exercise himself, because the right of the former, being extinguished by sect. 34 of c. 27, the mortgage would pass nothing (*c*), and there is nothing in the later statute giving the mortgagee a right to enter, if his entry would be barred by, and was, in fact, barred prior to, c. 27 (*d*).

Effect of mortgage and payment of interest by owner after time expired.

This statute, 1 Vict. c. 28, is declaratory as well as enacting, assumes mortgages to be within the general provisions of the 3 & 4 Will. 4, c. 27 (*e*), and in effect makes the right of a mortgagee first to accrue from the last payment of any part of either the principal money secured by the mortgage or the interest (*f*), even by the mortgagor, who, as between him and the person in possession, may be barred (*g*), or by a receiver (*h*).

Effect of 1 Vict. c. 28.

Where, since the 1 Vict. c. 28, the mortgagee is entitled to enter immediately upon the execution of the mortgage deed, and no interest has been paid, the right of the mortgagee first accrues on such execution (*i*).

This statute of the 1 Vict. c. 28, however, in terms extends to mortgages of land, "being land within the definition contained in the first section of the" 3 & 4 Will. 4, c. 27, and therefore not to mortgages of rent within the meaning by the same section attached to the term rent. But as the act is both declaratory as well as enacting, it may, perhaps, be held to apply to mortgages of rent also.

In terms not applicable to mortgages of rent.

The words in the sect. 3 of c. 27, "granted by any instrument other than a will," do not prevent the appli-

Alienation by will.

(*c*) 17 Q. B. 372.

(*d*) See *Doe d. Palmer v. Eyre*, 17 Q. B. 372; *Eyre v. Walsh*, 10 Ir. L. R., N. S. 351.

(*e*) See *Thorp v. Facey*, 12 Jur., N. S. 741; 85 L. J., C. P. 349; 1 H. & R. 678, S. C.

(*f*) *Forsyth v. Bristowe*, 8 Ex. 716.

(*g*) *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Re Muskerrey*, 9 Ir. Eq. R., N. S. 94.

(*h*) *Re Muskerrey*, supra.

(*i*) *Doe d. Roylance v. Lightfoot*, 8 M. & W. 559. See also *Wilkinson v. Hall*, 3 Bing. N. C. 508; *Doe d. Palmer v. Eyre*, 17 Q. B. 366.

cation of the statutory limitation of twenty years to claims of land or rent granted by will, and carry the matter no further than if the 3rd section had proceeded, by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case, not being enumerated in the 3rd section, fell back upon the general provision in the 2nd. Unless this were the construction, the devise of an estate in possession in land, or of an estate in possession in a rent-charge, first created by will, would be altogether unprovided for by the statute. For the third class of instances enumerated in sect. 3 describes the grant to be "by a person being in respect of the same estate or interest in possession or receipt of the profits of the land, or in receipt of the rent," a description which can neither apply to the case of a devise of a particular estate in land, or of a newly-created rent; for the deviser, who has by his will conveyed an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of the same estate or interest as that claimed by the devisee; still less can the deviser, who creates a new rent-charge by his will, be said to have been in receipt of the rent (*k*).

Accruer of
right to future
estates.

Where the estate or interest claimed has been in reversion or remainder, or otherwise future, and no person has obtained the possession or the receipt of the profits of the land, or the receipt of the rent, in respect of such estate or interest, the right first accrues when such estate or interest comes into possession (*l*).

What are such
estates.

This branch of this section seems to apply to only those future interests where the particular estate upon which they are expectant gives to the owner of it the

(*k*) See *Jamez v. Salter*, 3 Bing. (1) Sect. 3.
N. C. 544.

whole beneficial interest (*m*), and not to those where the future interest is a reversion, and the owner of it is entitled to the profits of the land, as in the case of a particular estate subject to a rent (*n*). In *Doe d. Davy v. Ozenham* (*o*) and *Grant v. Ellis* (*p*), indeed, cases of the latter description seem to have been considered as within this branch of the section. But in each of these cases the lessors appear to have been in the possession or receipt of the profits of the land before, and those claiming under them certainly were after, the leases were made, and therefore such cases were within the section 5.

Where the estate or interest in reversion comes into possession by the determination of any estate or estates in respect of which the land has been held, or the profits thereof, or the rent, have or hath been received, and the claimant, or some one through whom he claims, has been, at any time previously to the creation of the estate or estates determined, in possession, or receipt of the profits, of the land, or in receipt of the rent, the right first accrues on the determination of such estate or estates (*q*). Reversions.

This section seems to apply to only those cases where the particular estate is created with a reservation of rent, and the reversioner during such particular estate is or may be entitled to the rent (*r*); and the right of the reversioner, notwithstanding the non-payment of the rent reserved, first accrues on the determination of the particular estate (*s*). In what cases.

* (*m*) See *Jumpson v. Pitchers*, 13 Sim. 327; *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

(*n*) Co. Litt. 142 b.

(*o*) 7 M. & W. 131.

(*p*) 9 Ib. 113.

(*q*) Sect. 5.

(*r*) See *Doe d. Davy v. Ozenham*, *supra*; *Grant v. Ellis*, *supra*; *Doe d. Hall v. Mouldale*, 16 M.

& W. 689; *Hogan v. Hand*, 14 Mo. P. C. 310; *Poole v. Griffith*, 15 Ir. C. L. R. 277.

(*s*) See *Paget v. Foley*, 2 Bing. N. C. 679; *Doe d. Davy v. Ozenham*, *supra*; *Grant v. Ellis*, *supra*; *De Beauvoir v. Owen*, 5 Ex. 176; *Kennedy v. Woods*, Ir. R., 1 C. L. 76.

Wrongful receipt of rent on a lease.

But if the rent be reserved by a lease in writing, amounting to 20*l.* or upwards, and be received by some person wrongfully claiming the land, and be not afterwards paid to the person rightfully entitled, then the right of the reversioner first accrues when the rent was first so received and not on such determination (*t*); and as against the lessee, but subject to the lease, such receipt is a receipt of the profits of the land for the purposes of the c. 27 (*u*).

Interest carved out of a future one.

When an interest is carved out of a future estate or interest, the right, in respect of the interest so carved, accrues when such future estate or interest would come into possession (*x*).

On a presumed surrender of a life estate.

If a tenant for life, instead of taking possession, permit those in remainder to take and to continue it until the death of such tenant, a surrender of the life estate, at the time of such taking of possession, may be presumed, and the right will first accrue at that time (*y*).

Remainders expectant on chattel interests.

Although in the widest acceptation of the term remainder an estate of freehold limited after an estate for years is a remainder (*z*), yet an estate of freehold so limited is not, in strictness, a remainder, but an estate in possession, subject to the chattel interest, which indeed gives the right to the actual possession, and, therefore, a tenant in tail, whose estate is limited after such an interest, is immediate tenant in possession of the freehold, and a fine levied by him creates a discontinuance (*a*): and such an interest will not prevent the merger, or rather the union, of the freehold with the

(*t*) See sect. 9; *Doe d. Davy v. Owenham*, 7 M. & W. 131; *Grant v. Ellis*, 9 Ib. 113; *Doe d. Angell v. Angell*, 9 Q. B., N. S. 328.

(*u*) Sect. 35.

(*v*) *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

(*y*) *Tidball v. James*, 29 L. J., N. S., Ex. 91, as explained in *Murphy v. Murphy*, 15 Ir. L. R. 215.

(*z*) Co. Litt. 143 a.

(*a*) *Doe d. Cooper v. Finch*, 4 B. & Ad. 283.

inheritance (*b*), or an action of waste (*c*); and the entry of a stranger upon the land on the determination of such an interest would not be an intrusion (*d*). For the purposes of this section, however, an estate of freehold limited after such a chattel estate and in other respects a remainder would be an estate or interest in remainder.

A legatee in reversion or remainder of a chattel real may recover it on the determination of the prior interest, even though the personal representative assenting to the bequest might himself have been barred by the statute (*e*).

Future interests in chattels real.

In the branch of the sect. 3, relating to reversions, remainders or other future interests, and in the sect. 5, possession, and the receipt of the profits, of the land would seem to be synonymous.

Possession and receipt of profits, when synonymous.

The words "future estates or interests" are large enough to comprehend, and would comprehend, all executory devises (*f*); indeed, every kind of future interest not strictly reversionary or in remainder.

Executory interests.

Thus, where a husband and wife seised in fee in her right convey the land without a fine, the estate of the wife, or of her heir, on the determination of the marriage, is a future estate or interest within this branch of the sect. 3 (*g*).

So, in a limitation to them and to the heirs and assigns of the husband, the latter part of it, although properly a remainder (*h*), has been held to be a future estate or interest within the meaning of that section (*i*).

But where husband and wife seised in her right, he being also tenant by the curtesy initiate, voluntarily,

(*b*) *Bates' case*, 1 Salk. 254.

(*c*) Co. Litt. 54 a.

(*d*) Co. Litt. 277 a.

(*e*) *Quinton v. Frith*, Ir. L. R., 2 Eq. 326.

(*f*) Per Tindal, C. J., *James v. Salter*, 3 Bing. N. C. 544, 554.

(*g*) *Jumpsen v. Pitchers*, 13 Sim. 327. See *Ashton v. Milne*, 6 Ib. 339.

(*h*) Co. Litt. 184 b; *Wiscot's case*, 2 Rep. 60.

(*i*) *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

and not in pursuance of any contract or conveyance, relinquish the possession, and forty years elapse (*k*), the wife or her heir has no such future estate or interest as is contemplated by this branch of the section (*l*).

On merger of
the interest in
possession in
the future one.

The future interest may be or become immediately expectant on the estate in possession, and then the latter may merge either *sub modo* only or absolutely. In the former case, if the right have accrued in respect of the estate in possession, the period of limitation will continue to run in respect of the future interest; and in the latter case, if the right have accrued in respect of the estate in possession and is barred, the right in respect of the future estate will be barred also. Thus a lease for lives reserving rent was made in 1784, and the lessee, in 1789, devised the premises to his wife, her heirs and assigns, and she in 1793, for a valuable consideration, conveyed the premises to her younger son and the heirs of his body; but if he had no child at his death or in due time afterwards his estate to cease and the premises to revert to his mother. In 1811, this son purchased and took a conveyance of the reversion in fee, and died in 1812 without issue, leaving his nephew, the son of his elder brother, his heir, and also the heir of his grandmother. The nephew attained twenty-one in 1813, and died in 1834. On the death of the uncle his widow took possession, and continued it until her own death in 1843. The lease determined on the death of the last *cestui que vie* in 1835, and in 1846 the heir of the nephew brought ejectment, but was held to be barred. For the right of the nephew in respect of the estate in possession under the lease first accrued in 1812 on the death of the uncle, and being at the same time also entitled to the reversion, whether there was in either of them a merger, the reversion also was barred (*m*).

(*k*) Sect. 17.

(*l*) *Doe d. Corbyn v. Bram-*
ston, 3 Ad. & E. 63.

(*m*) *Doe d. Hall v. Moulds-*

dale, 16 M. & W. 689.

In every case, however, where any person has been barred of any estate or interest in possession in any land or rent by the determination of the period of limitation, and has, during that period, been entitled to any future estate, interest, right or possibility in the same land or rent, no new right accrues to such person on such future estate, interest, right or possibility coming into possession (*n*).

Future interests of persons whose interest in possession is barred.

But if, before such future estate, &c. come into possession, the land or rent has been recovered by some person entitled to an estate, interest or right, limited or taking effect after or in defeasance of the estate or interest in possession, a new right accrues to the person claiming such future estate, &c. on its coming into possession (*o*).

Thus, where copyholds were surrendered to a husband and wife, and to his heirs and assigns, and she, on his absconding, took possession, and continued it until her death, a new right in respect of the remainder (*p*) so limited to him accrued to his assignee in bankruptcy, who claimed and recovered the property (*q*).

So if, in *Doe d. Hall v. Mouldsdales*, on the death of the uncle an estate between the estate created by the lease and the estate in reversion, and not carved out of the latter, had arisen in a third person, who on the death of the nephew had obtained the possession in respect of such estate, or the reversion itself without any such intermediate estate had been vested in such person, the right to the reversion would have first accrued on the determination of the lease in 1835.

The recovery contemplated by the sect. 20, in the case there mentioned, need not be a recovery by virtue of legal proceedings (*q*). The possession by the wife,

(*n*) Sect. 20; *Doe d. Hall v. Mouldsdales*, 16 M. & W. 689, *supra*; *Clarke v. Clarke*, Ir. L. R., 2 Q. B. 395.

(*o*) *Ib.*

(*p*) *Vide supra*, p. 452 *et seq.*

(*q*) *Doe d. Johnson v. Liverseedes*, 11 M. & W. 517.

under the circumstances occurring in this case, during the whole period of her life was considered sufficient to preserve the right of the assignee of the husband to the reversion on her death.

Future interests not preceded by an estate tail.

If when the future interest, not being preceded by an estate tail, and not barrable by the tenant in tail (*r*), comes into possession, the person to whom the land or rent is limited be not *in esse*, as the first child of a person living who has no child, or his eldest child living at his death, or his heir by purchase, the right first accrues, and the time of limitation commences when such person is either *in esse*, or has been ascertained (*s*), and, as will be hereafter shown, the time may be prolonged beyond the general period of twenty years.

Preceded by such an estate.

In general, then, the right to future estates and interests first accrue when they come into possession, and it is a strong thing, and apparently a violation of every principle of justice, to deprive a person of a right, who has had no opportunity to assert it, *contra non valentem agere non currit præscriptio* (*t*); yet the right to such estates and interests when preceded by an estate tail and lawfully barrable by the tenant in tail is so taken away. Any hardship, however, in such a case is more apparent than real; for as the tenant in tail may exclude them, to bar his estate tail by the operation of this law and to leave such estates and interests untouched would be an anomaly in principle and a violation of the general policy of this law (*u*). And as under the 21 Jac. 1, c. 16 (*x*), so under the 3 & 4 Will. 4, c. 27 (*y*), when the right of the tenant in tail and of his issue has accrued under the

(*r*) Sects. 21, 22.

(*s*) Vide ante, Chap. II. Sect. II. of this Book.

(*t*) *Peniston's case*, Noy, 46; *Woodroffe v. Doe d. Daniel*, 15 M. & W. 769; 2 H. L. C. 811, 831; *Cannon v. Rimington*, 12 C. B. 1, 18.

(*u*) Vide Book I. Chap. I. Sect. II.

(*x*) *Tolson v. Kays*, 3 Brod. & Bing. 217.

(*y*) *Austin v. Llewellyn*, 9 Ex. 276. See also *Cannon v. Rimington*, 12 C. B. 1, 18.

sections 1 and 2, by being dispossessed of, or having discontinued, either the possession of the land, or the receipt of the rent, being rent within the section 1, during the whole period of limitation applicable and are then barred, the right to such future estates and interests is also barred (*z*); and, if the whole of such period has not expired, then, after the expiration of the remainder of the period, they are also barred (*a*), although at the death of the tenant in tail the person entitled to them be under disability (*b*).

The 1st and 2nd sections of this latter statute show Estates tail. what the operation is as to the issue (*c*), and the sections 21 and 22 seem to be studiously worded, so as to be confined to the case of persons entitled after the expiration of the estate tail (*d*).

These sections 21 and 22 appear to be directed to those future estates, &c. following an estate tail, where Estates after such estates. the bar to the tenant in tail has arisen from his acquiescence in a possession of land, or a receipt of a rent, wrongfully acquired by another person, independent of any act of such tenant, and not to such future estates, &c. following an estate tail as are not barred by his act, although the estate tail itself may be so barred (*e*).

This latter class of future estates, &c. is the subject Sect. 28 of 8 & 4 Will. 4, c. 27. of a distinct provision, by which, in effect, the right to any interest to take effect after or in defeasance of any estate tail in land or rent, conveyed by a tenant in tail thereof, by an assurance not operating to bar such interest, and in respect of which no person has been in possession of the land or in receipt of the rent, first accrues when such assurance, without the consent of any other person, would operate to bar such interest, and at the end of twenty years from that time the assurance will

(*z*) Sect. 21.

(*a*) Sect. 22.

(*b*) *Goodall v. Sherratt*, 3 Drew. 216.

(*c*) See 12 C. B. 16.

(*d*) See *Penny v. Allen*, 7 De G., M. & G. 409.

(*e*) See 12 C. B. 34.

be effectual against any person claiming such interest (*f*).

Object of that section.

The object of this provision is to give effect to acts of a tenant in tail against remaindermen and reversioners, and to assurances which, although effectual to bar the issue, were ineffectual to bar those entitled in remainder, and has no application to cases where assurances by a tenant in tail are ineffectual to bar the issue (*g*).

Effect of conveyances of tenant in tail in possession.

If a tenant in tail in possession with remaindermen over, or the reversion in fee in another person, has conveyed the land by fine, he bars the issue in tail (*h*), discontinues the remainders or the reversion, and creates, not merely a base fee determinable on the failure of the issue, but a fee defeasible by real action only, which, until so defeated, remains in the conuzor or his heir at law or devisee (*i*); and if the issue in tail fail twenty years after the 3 & 4 Will. 4, c. 27, the right of the remainderman or the reversioner will not accrue until the expiration of twenty years next after such failure of issue, and he may then bring his real action (*j*), notwithstanding the Statute of Fines (*k*). If the conveyance has been by feoffment it operates a discontinuance and creates a defeasible fee, as in the last case, but does not bar the issue (*l*), or if the conveyance has been by a common recovery, which for want of a tenant to the *præcipe* is voidable by the issue (*m*), and as neither the feoffor nor the recoveror can enter, neither the issue nor the persons entitled to estates and interests after the estate tail are barred, but may recover by action real (*n*), within twenty years from the death of the feoffor or the recoveror.

(*f*) Sect. 23.

(*g*) *Penny v. Allen*, 7 De G., M. & G. 409.

(*h*) 8 Co. 86.

(*i*) *Seymour's case*, 10 Rep. 96 a; *Doe d. Cooper v. Finch*, 4 B. & Ad. 283; *Doe d. Gilbert v. Ross*, 7 M. & W. 123.

(*j*) Sect. 38.

(*k*) 4 Hen. 4, c. 24.

(*l*) *Cannon v. Rimington*, 12 C. B. 1, 18.

(*m*) *Penny v. Allen*, 7 De G., M. & G. 409.

(*n*) Sect. 38.

But if the conveyance has been by a covenant to stand seised, lease and release, or a recovery without a good tenant to the *præcipe* (*o*), a base fee, determinable on the failure or by the entry of the issue, is created (*p*); and after a long possession against a tenant in tail under a conveyance supposed to be made by him, the presumption in favour of the issue in tail claiming is, that the possession was under an innocent conveyance, and therefore no bar to the issue (*q*).

The base fee, though defeasible, is not to be considered as a wrongful estate, and has all the incidents of a rightful estate until defeated. If the issue in tail neglect to make an entry so long that his right of entry is gone, the continuance of possession by persons claiming under the base fee cannot alter the nature of the estate, but its effect is to bar the claim of the issue in tail, and so render the base fee indefeasible, and thereby to confirm and corroborate the estates of those who, under the limitations to which the base fee is subject, are entitled to successive portions of the fee, and not to extinguish or vary those limitations (*r*).

Nature of the estate under them.

Under the section 23, the assurance must be such as, at the expiration of twenty years next after the commencement of the time at which the assurance, if then executed by the tenant in tail, or the person who would have been entitled to the estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar the estate or estates, to take effect after or in defeasance of the estate tail. But, except in the case of *Penny v. Allen*, the assurance in each of the cases noticed would not, at any time, have operated to bar such estate or estates, and therefore was not aided by this provision; and in *Penny*

Nature of the assurance under sect. 23.

(*o*) Touch. 48; *Penny v. Allen*, 7 De G., M. & G. 409.

(*p*) *Machell v. Clarke*, 2 Ld. Raym. 778; *Doe d. Daniel v. Woodroffe*, 15 M. & W. 769; 2

H. L. C. 811; *Doe d. Smith v. Pike*, 3 B. & Ad. 742.

(*q*) *Doe d. Smith v. Pike*, 3 B. & Ad. 738.

(*r*) 15 M. & W. 798.

v. *Allen* the period of limitation, when the recovery would, without the consent of any other person, have barred the estate tail and the subsequent estates, had not expired at the commencement of the suit by the issue.

Proof of future estate coming into possession.

When the future estate, interest or right comes into possession upon the death of a person, and there is an absence of all grounds for presuming, at any given period, the surrender of the estate of such person (*s*), the actual time of the death of such person must be proved. The presumption that such person has not been heard of for seven years is insufficient, and applies to only the fact, and not to the time of the death, and that time, when material, must be proved (*t*).

Accruer of right on forfeiture or breach of condition.

The evidence of the death of such person, however, is necessary in only those cases where the possession is immediately expectant on that event, and not where the life estate in possession rests on such presumption (*u*).

Where the claimant, or some one through whom he claims, becomes entitled by any forfeiture or breach of condition, there the right first accrues when the forfeiture is incurred or the condition is broken (*x*).

Thus a right of entry under the common condition of re-entry in a lease, on non-payment of the rent reserved, accrues on the first default, and after the possession by the lessee for more than twenty years without paying any rent, either to the lessor or any other person, cannot be enforced (*y*). But still the right of the lessor to recover the demised premises, notwithstanding no such payment, will again accrue on the expiration of the lease (*z*).

(*s*) *Tidball v. James*, 29 L. J., N. S., Ex. 91, explained in *Murphy v. Murphy* 15 Ir. L. R. 215.

(*t*) *Nepean v. Doe d. Knight*, 2 M. & W. 894; *Dunn v. Snowden*, 2 Drew. & S. 201.

(*u*) See *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

(*x*) Sect. 8.

(*y*) *Doe d. Mannion v. Bingham*, 3 Ir. L. R. 456, approved in *Daly v. Blomfield*, 5 Ib. 65.

(*z*) *Doe d. Dary v. Oxenham*, 7 M. & W. 181.

In *Owen v. De Beauvoir* (a), the report of the case of *Doe v. Bingham*, in the Irish Law Reports, appears not to have been seen by the court; for Alderson, B., alluding to this case, said an old forfeiture of twenty years standing would be within the act. The forfeiture in question sprung originally out of the non-payment of rent, but whether it had arisen more than twenty years before does not appear. But in that report the court stated the right of entry to have first accrued in 1797.

The last branch of the section 3 is the only part of this section, said Lord St. Leonards (b), that can be supposed to apply to mortgages, and the 1 Vict. c. 28, leaves the former act to point out when the right first accrues. The application of this branch, however, is to only those mortgages where the possession of the land is to be retained by the mortgagor until default is made in paying the mortgage money (c), and not to those mortgages where the possession is not to be so retained, but containing only the usual provision for redemption and re-conveyance (d). In the case of mortgages.

But where the right accruing by such forfeiture or breach first accrues in respect of any estate or interest, either in reversion or remainder, and the land or the rent is not recovered by virtue of such right, the right first accrues in respect of such estate or interest when that estate or interest comes into possession, as if no such forfeiture or breach had happened (e). In respect of estate in reversion or remainder.

In the case of a forfeiture on the breach of a condition in law, the right is, at common law, even now, notwithstanding the 32 Hen. 8, c. 34 (f), and the 8 & 9 For whom forfeiture or breach available.

(a) 10 M. & W. 547, 560.

(b) 2 Con. & L. 147.

(c) *Wilkinson v. Hall*, 8 Bing. N. C. 508.

(d) See *S. C.*; *Doe d. Roylance v. Lightfoot*, 8 M. & W. 559; *Doe*

d. Jones v. Williams, 5 Ad. & E. 291; *supra*, p. 451.

(e) Sect. 4.

(f) Co. Litt. 215 a; *Fenn v. Smart*, 12 East, 444.

Vict. c. 106, s. 6 (*g*), available for only the person in whose time the forfeiture was incurred.

Non-existence
of persons on
right accruing.

We have already seen, that when the right first accrues, a person capable of suing, and another capable of being sued, must be in existence (*h*). In the case of claims to chattels real, the right thereto may first accrue when neither or only one of such persons is in existence. Thus both or either of such persons may have died, either leaving a will appointing an executor, and the executor neither proves the will nor acts in the administration of the assets of his testator or intestate, and no administration has been obtained; or the person to, and the person against whom the right first accrues, may claim and be liable respectively in only a representative capacity, and be one and the same. In these cases, the *termini* of computation for the period of limitation will vary.

Executor.

From the will of a testator, and not from the probate of it (*i*), the executor derives his title; and his title commences, and the property of the testator vests in the executor, from the testator's death (*k*); not, however, *instantly*, but by his subsequent act of taking upon himself the administration of the will (*l*). But the only evidence of his title is either the probate (*m*), or the probate act in the book of the Prerogative Court (*n*), and when obtained by one of several executors is sufficient for all (*o*).

(*g*) See *Hunt v. Bishop*, 8 Ex. 675; *Hunt v. Remnant*, 9 Ib. 640.

(*h*) Vide Chap. II. Sect. II. of this Book.

(*i*) *Graysbrook v. Fox*, Plowd. 275; *Hensloe's case*, 9 Co. 38 a; *Comber's case*, 1 P. W. 767; *Ex parte Winter*, 5 Russ. 284.

(*k*) *Ib.*; *Wolley v. Clark*, 5 B. & Ald. 744.

(*l*) Per Lord Redesdale, 1 Sch. & L. 289. See also *Webster v.*

Webster, 10 Ves. 93; *Cottle v. Aldrich*, 4 M. & S. 175.

(*m*) *Wankford v. Wankford*, 1 Salk. 301; *Pennney v. Pennney*, 8 B. & C. 286; *Easton v. Carter*, 5 Ex. 8.

(*n*) *Cox v. Allingham*, Jac. 514; *Doe d. Edwards v. Gunning*, 2 Nev. & P. 260; *Johnson v. Warwick*, 17 C. B. 526.

(*o*) *Walters v. Pfeil*, 1 M. & M. 362; *Watkins v. Briant*, 7 Sim. 512; 1 Myl. & C. 101; *Scott*

The title of an administrator, however, is derived Administrator. from the grant of the administration (*p*), and, *ex necessitate*, cannot commence *instante* (*q*), but generally commences (*r*), and in him the property of the intestate vests (*s*), from only the time of such grant being made.

But, though the title of an administrator arises on His title by only the grant of the administration, yet, in the case of relation. personal chattels, at least, he has so far a title by relation, from the death of the intestate, as to recover for mesne injuries to them (*t*), or for their conversion (*u*), or for their recovery from a person wrongfully withholding them (*x*), or where an act to be ratified is for the protection and benefit of the estate of the intestate (*y*), and works no wrong to a third person (*z*). But an act done to the prejudice of the estate of the intestate by a person who afterwards becomes administrator is not ratified by the subsequent administration (*a*).

So, in the case of chattels real, an administrator has, by such relation, a title to recover, and may recover them in ejectment on a demise laid before the grant of the administration (*b*); but not to effectuate a legal proceeding, as an assignment of them made (*c*), or a distress taken (*d*), before the grant.

v. Briant, 6 Nev. & M. 381; *Webster v. Spencer*, 3 B. & Ald. 363; *In re Needham*, 1 Jo. & Lat. 84.

(*p*) *Wankford v. Wankford*, supra; 1 Adol. & E. 49.

(*q*) Per Lord Redesdale, 1 Sch. & L. 289.

(*r*) *Cury v. Stephenson*, Salk. 421; *Murray v. E. I. Company*, 5 B. & Ald. 204.

(*s*) *Wolley v. Clark*, 5 B. & Ald. 744.

(*t*) See 7 M. & W. 312.

(*u*) *Thorpe v. Stallwood*, 5 Man. & G. 760.

(*x*) *Foster v. Bates*, 12 M. &

W. 226. See also *Oughton v. Seppings*, 1 B. & Ad. 241.

(*y*) Per Parke, B., *Morgan v. Thomas*, 8 Ex. 305; *Bodger v. Ash*, 10 Ib. 333.

(*z*) *Keane v. Dec*, 1 Al. & Nap. 496, n.

(*a*) *Foster v. Bates*, supra; *Thorpe v. Stallwood*, supra; *Morgan v. Thomas*, supra; *Doe d. Hornby v. Glenn*, 1 Ad. & E. 49; *Lyons v. Muldarry*, Hayes' Rep. 530.

(*b*) *Patten v. Patten*, 1 Al. & Nap. 493.

(*c*) See *S. C.*

(*d*) *Keane v. Dec*, supra.

But, as in the case of chattels personal, so, by parity of reasoning, the law ought to give a relation to enable him to recover for mesne injuries to chattels real (*e*). Generally, however, for any collateral purpose (*f*), there is no such relation, and to maintain trespass he must acquire the actual possession, either by process of law (*g*) or by actual entry (*h*), and therefore obtain a grant of administration.

For some purposes, however, a person who, as *sole* next of kin, is entitled to a chattel real which had belonged to an intestate may, by this principle of relation, be considered before the actual grant of administration to such person, the owner of such chattel (*i*).

Accruer of
right before
representation
complete.

When the right to a chattel does not first accrue to or against the person originally entitled to, or claiming it, but to his executor (*k*) or administrator (*l*), the right does not accrue to or against the executor until he is within the realm, and has either proved the will of his testator, or has acted in that character (*m*); or to or against an administrator, until a grant of administration has been obtained, for the right is incomplete, or rather suspended, until a person to sue and another to be sued are in existence (*n*).

So where, after the right has first accrued, proceedings are taken to assert it, but, by the death of the person against whom they are taken, abate, and his will is not proved, or administration to his effects is not obtained,

(*e*) See *Rea v. Inhabitants of Horsley*, 8 East, 410; *Barnett v. Earl of Guildford*, 11 Ex. 19.

(*f*) 8 East, 410.

(*g*) *Patton v. Patton*, *supra*.

(*h*) *Barnett v. Earl of Guildford*, *supra*.

(*i*) See *Rea v. Inhabitants of Horsley*, 8 East, 405.

(*k*) *Jolliffe v. Pitt*, 2 Vern. 694; on this case see 4 Bing. 705; 4 M. & W. 59, 65; *Perry v. Jenkins*, 1 Myl. & C. 118; *Webster v. Webster*, 10 Ves. 93; *Douglas*

v. Forrest, 4 Bing. 686; *Story v. Fry*, 1 You. & C. C. C. 603; *Flood v. Patterson*, 29 Beav. 295.

(*l*) *Cary v. Stephenson*, 2 Salk. 421; *Stanford's case*, cit. Cro. Jac. 61; *Fairclain v. Little*, 5 B. & Ald. 214; *Murray v. East India Company*, Ib. 204; *Perry v. Jenkins*, 1 Myl. & C. 118.

(*m*) *Webster v. Webster*, 10 Ves. 93; 1 Sch. & L. 289; *Cottle v. Aldrich*, 4 M. & S. 175.

(*n*) *Douglas v. Forrest*, 4 Bing. 686.

until after the period of limitation has expired, the time during which the will remains unproved, or the executor does not administer, or no administration has been obtained, will not affect the right (*o*).

The executor or the administrator, however, must be a rightful one, for whilst there is only a wrongful one the right is not affected. A wrongful administrator, or, as he is commonly designated, an executor *de son tort*, is where a person without obtaining a grant of administration to a person dying intestate, and in some cases and for some purposes even where a person dies leaving a will appointing an executor, before such executor administers the assets or proves the will (*p*), takes and uses or sells the effects of the intestate or the testator (*q*). But such an executor, and a rightful one, who has proved the will, or acted in the administration, cannot co-exist (*r*). The wrongful executor, as he is designated, is liable to and may be treated as the agent of the rightful one; and although he continue to act in the administration of the estate of the testator after the death of the executor, and when even there is no personal representative of the original testator, does not become an executor *de son tort* (*s*). So a person acting as the attorney of one of several executors, who has alone proved the will, cannot be treated as a wrongful executor; but continuing to act after the death of such executor, although with the advice of one of the surviving executors, who has neither proved the will nor acted, may be so treated (*t*).

A rightful executor who has acted in the administration of his testator's estate without having proved the

Or whilst the representative wrongful only.

Rightful executor is always such.

(*o*) *Sturgis v. Darell*, 4 Ex., N. S. 630; 6 Ib. 120. See also *Perry v. Jenkins*, 1 Myl. & C. 118.

(*p*) *Read's case*, 5 Co. 83; *Cottle v. Aldrich*, 4 M. & S. 175.

(*q*) *Read's case*, supra; *Thomson v. Harding*, 2 Ell. & B. 630.

(*r*) *Read's case*, supra; *Tomlin v. Beek*, 1 Turn. & R. 488.

(*s*) *Tomlin v. Beek*, 1 Turn. & R. 488.

(*t*) *Cottle v. Aldrich*, supra.

will has been designated an executor *de son tort* (u). But this is a mere inaccuracy of the reporter. The same person cannot be at one and the same time both a rightful and a wrongful executor, and in law he would be recognized in his rightful character only.

Time elapsed
against person
liable available
for his repre-
sentative.

When the right has once accrued, the executor or the administrator of the person against whom it is to be asserted, although such executor has not proved the will of his testator, or such administrator has not been constituted for some time after the death of the testator or the intestate, will be entitled to and may claim the benefit of the time which has elapsed since the death of his testator or the intestate (v).

Where person
to and against
whom right
first accrues is
one and the
same.

If when the right to a chattel real first accrues, the person to and the person against whom it accrues be one and the same, and claim or be liable in a representative capacity, whether as executor or administrator, the Statute of Limitation cannot operate. For although in the case of a creditor appointing his debtor executor, the debt is extinguished at law (x), on the supposition of its being paid by the executor to himself, and thus becoming assets to be administered by him, and for which, on that supposition, he is accountable for the amount in a court of equity (y), and the not administering, which would be devastavit; yet it is apprehended that where the property involved is a chattel real, no such extinguishment would take place (z), or, even if it did take place, a suspension of the remedy so long as

(u) See *Webster v. Webster*, 10 Ves. 98.

(v) *Rhodes v. Smethurst*, 4 M. & W. 42; 6 Ib. 351; *Fraake v. Cranefeldt*, 3 Myl. & C. 499; *Howlett v. Lambert*, 2 Ir. Eq. R. 254.

(w) *Nadham's case*, 8 Co. 135; *Wankford v. Wankford*, 1 Salk. 299; Holt's Rep. 366, *S. C.*; *Cheetnam v. Ward*, 1 Bos. & P. 630; *Freakley v. Fox*, 9 B. & C. 130.

(y) *Wankford v. Wankford*, supra; *Field v. Clark*, 1 Ch. Ca. 242; *Carey v. Goodings*, 3 B. C. C. 110; *Fox v. Fox*, 1 Atk. 463; *Simmons v. Gutteridge*, 18 Ves. 262; *Selwin v. Brown*, Cas. temp. Talb. 240; Plowd. 186; Yelv. 160; Cro. Car. 378; 8 Salk. 163; 9 B. & C. 132; *Ingle v. Richards*, 28 Beav. 366.

(z) See post, p. 470.

the twofold character of such person might continue, as in the case of an administrator would take place; or, in any way, the executor would hold, in equity, the chattel real as an express trustee for the benefit of the persons beneficially interested under the will of the claimant or of his next of kin, and therefore could not avail himself of the statute as against such persons or next of kin.

In determining the time at which the right of administrators, in respect of certain chattel interests within the 3 & 4 Will. 4, c. 27, is to be considered as first accruing, the doctrine of relation before stated has been adopted in the 6th section of this statute.

Right of administrator by relation under sect. 6 of 3 & 4 Will. 4, c. 27.

This section, though expressed in general terms, seems to be also confined to those cases where chattels real are claimed. The person claiming as administrator is to claim "the estate or interest" of the deceased person of whose "chattels" he has been appointed administrator. This term "chattels" here seems to be descriptive merely. The terms "estate or interest" in this section, taken in connection with the use of them in the 1st section, point immediately to the nature of the subject claimed, that is, land in the extended meaning given to that term by the latter section, that is, all corporeal hereditaments, including tithes, generally of any tenure; and any "estate or interest" in them, but may extend to chattel interests in rents or other incorporeal hereditaments exclusive of tithes. For the term state or estate signifieth such inheritance, freehold, term for years, tenancy by elegit or the like as any man hath in lands or *tenements* (a), and interest, *interesse*, is vulgarly taken for a term or chattel real, and more particularly for a future term, in which case it is said in pleading that he is possessed *de interesse termini*. But *ex vi termini* in legal understanding extendeth to estates,

(a) Co. Litt. 345 a.

rights and titles that a man hath of, in, to or out of lands (*b*), and to the land itself (*c*), and therefore in the latter sense is more comprehensive than the term estate. In the c. 27, however, the term interest seems to exclude estates according to the signification attributed to the term estate by Lord Coke just given, but to include rights in the sense in which the term right is used at law, that is, as an estate turned to a right (*d*), and also titles, in the sense in which the term title is there used, that is, as the means by which land is acquired, as by fine, feoffment, &c. (*e*); and as those terms respectively, when applied to rights and titles of a nature merely equitable, may be used by analogy.

Effects of that section.

The effect of this section is to make the right of an administrator, claiming in his representative capacity, to accrue at the same time as it would have accrued if the intestate had been alive (*f*).

Restricted to administrators,

This section is also restricted to administrators. As regards executors who have not obtained probate of the will, or have not administered the effects of their testator, the law in this respect remains unaltered.

—and who are claimants.

This section is confined to those cases where the administrator is or may be the claimant, and does not extend to those cases where he is or may be the person against whom the claim is made.

Same person administrator of both persons, remedy is suspended.

Notwithstanding this section, where the person against whom the claim to a chattel real exists becomes also the administrator of a deceased claimant of it, no extinguishment of the right, even in the case of a debt (*g*), takes place, but the remedy is suspended during the existence of such twofold character in the same person.

(*b*) Co. Litt. 345 b.

(*c*) 2 Mod. 134.

(*d*) Co. Litt. 345 a, b.

(*e*) Ib. 345 b.

(*f*) See *Quinton v. Frith*, Ir. L. R., 2 Eq. 396.

(*g*) *Nodham's case*, 8 Co. 135; *Wankford v. Wankford*, 1 Salk. 299; Holt's Rep. 366, S. C.; *Seagram v. Knight*, L. R., 2 Ch. Ap. Ca. 628.

The land or the rent may be held by, and be in the possession of, either a tenant at will or a tenant from year to year, or other period, and either without, or by virtue of, a lease in writing, and then the time when the right accrues varies with the tenancy; or an acknowledgment of the title of the person entitled to the land or the rent by the person in possession, or in receipt, may have been given, and regulates such time.

Accruer of
right on
tenancies.

In the case of a tenancy at will, the right of the person entitled to the land or the rent subject thereto first accrues, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, and such tenancy is to be deemed to have then determined (*h*). In other words, the determination is in an alternative. If it be by the lessor or by the tenant, within twenty-one years from the commencement of the tenancy, a determination by the statute is excluded; if by the statute, a determination by the lessor or by the tenant is excluded (*i*).

Tenancy at
will.

In *Randall v. Stevens*, one argument was, that the absence in the section 7 of the words, "which shall last happen," in the section 8, raised the inference, that in the former section the right first accrues on whichever of the two periods there mentioned *first* happens. The consequence of this interpretation, if adopted, would be, that the determination of the tenancy by the parties themselves, as well as by the statute, must be at the end of one year next after the commencement of the tenancy, or, in other words, that, universally, every tenancy at will shall be deemed to have determined by operation of the statute after the expiration of one year from the commencement. But the court thought that such an interpretation could not be sustained.

A tenancy at will, that is, a tenancy either created by contract binding on both parties, or arising from the

How created
and deter-
mined.

(A) Sect. 7, 3 & 4 Will. 4, c. 27;
8 C. B. 258.

(i) See *Randall v. Stevens*, 2
Ell. & B. 641.

relation in which they are placed to each other (*k*), and determinable at the will of either (*l*), may be determined, either by the death (*m*) or by the act of either party, and, in the latter case, either expressly, as by the lessor coming on the land, and forbidding the tenant to hold any longer (*n*); or by demanding the possession, either absolutely (*o*) or on terms, and the terms rejected (*p*); or implied, as by his entering on the land, and cutting down a tree, where the trees are not excepted; or putting his beast on a common appendant to a manor leased at will, and even in the absence of the lessee (*q*); or merely entering on the land (*r*), or entering thereon, and making livery of seisin (*s*), or serving the tenant with a declaration in ejectment (*t*); or by voluntary waste committed by the tenant; or by the lessor or the tenant granting his estate, and the grantee entering on the land (*u*): for although the tenant can, as against himself (*x*), create such a tenancy, yet he cannot as against his lessor (*y*), but the lessor (*z*) and the lessee (*a*) must have notice of the transfer. The tenancy may also be determined by the entry of a lessee for years of the lessor (*b*), although the lease may be invalid (*c*), or by an agreement to purchase (*d*).

When not
determined.

But the tenancy is not determined either by the mere

(*k*) Litt. s. 70; *Ley v. Peter*, 3 Ex., N. S. 101.

(*l*) Co. Litt. 55 a.

(*m*) Ib. 57 b; *Doe d. Stanway v. Rock*, Car. & M. 549; *James v. Dean*, 11 Ves. 391.

(*n*) Co. Litt. 55 b; *Pollen v. Brewer*, 7 C. B., N. S. 371.

(*o*) *Doe d. Jones v. Jones*, 10 B. & C. 718; *Roe d. Blair v. Street*, 4 Nev. & M. 42.

(*p*) *Doe d. Price v. Price*, 9 Bing. 356.

(*q*) Co. Litt. 55 b; *Ball v. Cullimore*, 2 C. M. & R. 120.

(*r*) *Lapierre v. McIntosh*, 9 Ad. & E. 857; *Randall v. Stevens*, 2 Ell. & B. 641.

(*s*) *Ball v. Cullimore*, supra.

(*t*) *Locke v. Matthews*, 13 C.

B., N. S. 753.

(*u*) Co. Litt. 57 a; *Doe d. Davies v. Thomas*, 6 Ex. 854.

(*x*) *Doe d. Goody v. Carter*, 9 Q. B. 863. See also *Doe d. Blair v. Street*, 4 Nev. & M. 42.

(*y*) 9 Q. B. 865. See also *Melling v. Leak*, 16 C. B. 652.

(*z*) *Carpenter v. Collins*, Yelv. 73; *Pinhorn v. Souster*, 8 Ex. 763; *Melling v. Leak*, 16 C. B. 652.

(*a*) *Doe d. Davies v. Thomas*, supra.

(*b*) *Hogan v. Hand*, 14 M. P. C. C. 311.

(*c*) *Wallis v. Delmar*, 29 L. J., N. S., Ex. 276.

(*d*) *Daniels v. Davison*, 16 Ves. 252.

granting of a lease by the lessor, to commence at a future day (*e*), or by his making a mortgage of the demised premises (*f*); or where the tenant himself creates such a tenancy, and takes a conveyance of the demised premises to himself, although that determines his own tenancy, it does not determine the tenancy created by him (*g*).

Although the lessor may at any time determine his will by entering, yet he has not a right of entry at all times from the first commencement of the tenancy, independent of a previous determination of it, but only a right to determine it (*h*). Position of the lessor.

Although, in general, rent cannot be reserved out of an incorporeal hereditament, except by the King (*i*), yet there is no absolute absurdity in supposing that a person, seised in fee, or for life, of a rent-charge, might, for a gross sum of money, demise it for years or at will at a certain rent, and the term rent in this section means rent-charge (*k*).

The object of this section 7 is to fix a definite period after the commencement of a tenancy at will, beyond which the tenancy shall not be presumed to have had a continuance, and at the end of which the right of entry of the lessor, as against his tenant at will, shall be deemed to have accrued (*l*), and the effect of the section generally seems to be to prevent, in all cases, and not merely for the purposes of the act, for the words of it are general, the creation of a continuous tenancy at will. In *Doe d. Goody v. Carter* (*m*), Patteson, J., said, *arguendo*, "I doubt if there can now be a continuous tenancy at will. There may be a new one every year. Statute 3 & 4 Will. 4, c. 27, s. 7, considers tenancy at will as determining at the end of one year after its commence- Object and effect of sect. 7 of 3 & 4 Will. 4, c. 27.

(*e*) *Hogan v. Hand*, *supra*.

(*f*) *Doe d. Goody v. Carter*, 9 Q. B. 868.

(*g*) *Ib*.

(*h*) See 8 C. B. 251.

(*i*) Co. Litt. 47 a, 144 a.

(*k*) Per Cur. 9 Q. B. 866.

(*l*) 8 C. B. 251, 253.

(*m*) 9 Q. B. 868, 867.

ment. It seems to be for all purposes" (n). The construction of this section is not affected by the section 14 (o).

The tenancies within that section.

The tenancies at will within this section are only those which existed at (p), or those created subsequently to (q), and not those which had determined before (r), or those which, existing at the passing of the act, but under which the possession was not then adverse, were determined within five years after (s) the passing of the act.

If, before the right of entry upon a tenant at will be gone, the tenancy be determined and a new one created by fresh agreement, express or implied, between the parties, a fresh right of entry accrues, and an additional period of twenty years must expire before that right will be barred (t).

Where the tenancy was created more than fifty years before, and was existing when the c. 27 passed, and the possession under it, not being then adverse, the tenancy was determinable within five years after (u), and was determined within that period by the death of the last of the tenants, and shortly afterwards another tenancy at will was created in other persons, the right of the lessor accrued on the determination of the latter tenancy (x). In this case the court, alluding to the determination of the former tenancy, treated such deter-

(n) But see *Randall v. Stevens*, 2 Ell. & B. 641.

(o) See *Locke v. Matthews*, 13 C. B., N. S. 753.

(p) *Doe d. Bennett v. Turner*, 7 M. & W. 226; 9 Ib. 643; *Doe d. Dayman v. Moore*, 9 Q. B. 555; *Doe d. Goody v. Carter*, Ib. 863; *Doe d. Lansdell v. Gower*, 17 Ib. 589; *Locke v. Matthews*, 13 C. B., N. S. 753; *Randall v. Stevens*, 2 Ell. & B. 641. See also *Doe d. Palmer v. Eyre*, Ib. 366; *Doe d. Evans v. Page*, 5 Ib. 767.

(q) See *Doe v. Page*, supra.

(r) *Doe d. Burgess and Harrison v. Thompson*, 5 Ad. & E. 532; *Doe d. Thompson v. Thomp-*

son, 6 Ib. 721; *Doe d. Evans v. Page*, 5 Q. B. 767; *Doe d. Birmingham Canal Co. v. Bold*, 11 Ib. 127. See also *Doe d. Bennett v. Turner*, supra; *Hodgson v. Hooper*, 3 Ellis & E. 149; *Hogan v. Hand*, 14 M. P. C. C. 311.

(s) *Hodgson v. Hooper*, supra.

(t) *Doe d. Bennett v. Turner*, 7 M. & W. 226; 9 Ib. 643; *Randall v. Stevens*, 2 Ell. & B. 641; *Hodgson v. Hooper*, 3 Ell. & E. 149; *Locke v. Matthews*, 13 C. B., N. S. 753.

(u) Sect. 15.

(x) *Hodgson v. Hooper*, 3 Ell. & E. 149.

mination as being by the act of the lessor in creating the latter one, but the determination was, in fact, by the death of the last of the tenants.

The tenancy, if not determined by the parties within twenty-one years from the commencement of it, but by force of the sect. 7, must be a continuous one for the whole twenty-one years, or the lessor does not lose his right (*y*). When to be continuous.

After the expiration of twenty-one years of a continuous tenancy at will, if the landlord were to enter, no subsequent right of entry having accrued to him, this entry would not be within twenty years next after the time at which the right to make such entry first accrued, and would therefore be unlawful; and, by the sect. 34 of the statute, his right of entry would be extinguished (*z*).

Whether where the tenant remains in possession continuously for twenty-one years, the tenancy being determined during that time by an act of the landlord, without his having actually been in possession, and the possession be continued by the tenant, who is then tenant at sufferance, for a further period, which, added to that of his possession under the tenancy at will, exceeds that term, the possession under the two tenancies together will constitute a bar, is questionable (*a*). Where the tenancy continued for twenty-one years and upwards, but determined before the statute passed, the possession continued afterwards either by (*b*), or by persons claiming by or through (*c*), the tenant, the possession was held to give no title against the lessor. In *Doe d. Bennett v. Turner* (*d*), however, the court

Effect of a tenancy, partly at will, and partly by sufferance.

(*y*) *Randall v. Stevens*, 2 Ell. & B. 641; *Hodgson v. Hooper*, 3 Ell. & B. 149; *Locke v. Matthews*, 13 C. B., N. S. 753.

(*z*) See *Randall v. Stevens*, 2 Ell. & B. 641.

(*a*) See *Randall v. Stevens*, 2 Ell. & B. 641; *Locke v. Matthews*,

13 C. B., N. S. 753.

(*b*) *Doe d. Birmingham Canal Co.*, 11 Q. B. 127.

(*c*) *Doe d. Burgess and Harrison v. Thompson*, 5 Ad. & E. 582; *Doe d. Thompson v. Thompson*, 6 Ib. 721.

(*d*) 7 M. & W. 226.

seems to have thought that a continuance of the possession by the tenant, after the determination of the tenancy within twenty-one years from its commencement, for a further period, which, with that of the tenancy, exceeded that term, would bar the lessor. But the case was decided on another ground.

Tenancies at will excluded when between

Tenancies at will, however, as between mortgagor and mortgagee, and between trustee and *cestui que trust*(*e*), are, by the section 7, expressly excluded from it.

—mortgagor and mortgagee;

The statute, said Williams, J. (*f*), does not intend to alter the relative position of the mortgagor and mortgagee (*g*). It merely excludes from the sect. 7 such tenancies between them.

The precise relation between mortgagor and mortgagee has been the subject of much diversity of judicial opinion (*h*). The ordinary relation of lessor and lessee at will, in all respects, does not exist (*i*). An ordinary lessor at will must determine the tenancy before he can recover the possession, but a mortgagee need not. It has been said, however, that the section 7 virtually recognizes the existence, between a mortgagor and a mortgagee, of this relation (*j*).

—trustee and *cestui que trust*;

The object of the statute was not to deal with cases like that of trustee and *cestui que trust*, where, though there are two parties, there is but one single interest—that of the person beneficially entitled (*k*); and the statute does not alter their relative position (*l*).

The existence of the relation of lessor and lessee at will between a trustee and his *cestui que trust* seems to

(*e*) Vide ante, Chap. II. of this Book, Sect. V.

(*f*) 16 C. B. 667.

(*g*) See also *Thorp v. Facey*, 12 Jur., N. S. 741, 1 H. & R. 678, 35 L. J., C. P. 349, S. C.

(*h*) Vide ante, Chap. II. of this Book, Sect. III.

(*i*) *Thorp v. Facey*, supra.

(*j*) See *Molling v. Leah*, 16 C. B. 652. But see *Thorp v. Facey*, supra.

(*k*) 8 C. B. 250.

(*l*) Per Williams, J., 16 C. B. 667. See also *Sturgis v. Morse*, 24 Beav. 541; 3 De G. & J. 1, S. C., on appeal. On this case see 13 Ir. Eq. R., N. S. 458.

be generally admitted (*m*), and seems to be recognized by the section 7, not less than between a mortgagor and a mortgagee. In *Melling v. Leak* (*n*) Williams, J., said he did not assume the section 7 to show that the *cestui que trust* is tenant at will to the trustee (*o*).

In the case of trustee and *cestui que trust* the language of the section 7 is equivalent to saying that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to have been introduced in order to prevent the necessity of any active steps being taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time. The intention appears to be, to put the estate of a trustee in a *better* state, in this respect, than that in which the estate of an ordinary lessor is, as against his tenant at will (*p*).

The tenancies at will arising between trustee and *cestui que trust*, which are excluded by the proviso from this section, are in those cases where the trust is express only (*q*); and, even in these cases, where the *cestui que trust* is himself in the actual possession (*r*), and not where he is a mere bailiff or agent of the trustee in the letting and management of the property to, and in the possession of, other persons (*s*).

—where the trust is express;

The tenancies at will which arise in those cases where the trust is implied, or arises by construction of equity, are not so excluded, but are within this section. As where a contract is made for the sale and purchase of land, not creating a tenancy from year to year at a

—but not where implied only.

(*m*) Vide ante, Chap. II. of this Book, Sect. III.; *Garrard v. Tuck*, 8 C. B. 231.

(*n*) 16 C. B. 652.

(*o*) But see *Garrard v. Tuck*, 8 C. B. 253.

(*p*) 8 C. B. 253.

(*q*) *Doe d. Stanway v. Roob*,

1 Car. & M. 549; 4 Man. & G. 80, S. C.; *Stewart v. Marg. Conyngham*, 1 Ir. Eq. R., N. S. 534.

(*r*) *Garrard v. Tuck*, supra.

(*s*) *Doe d. Jukes v. Sumner*, 14 M. & W. 39; *Melling v. Leak*, 16 C. B. 652.

yearly rent (*t*), and the purchaser is let into possession, a tenancy at will is created, but, according to one case (*u*), not until the contract is at an end (*x*). In *Toft v. Stephenson* the purchaser entered into possession, and shortly afterwards entered into a sub-contract for sale of part of the land, and delivered the possession to the sub-purchaser, and thus determined the tenancy (*y*). The case, however, was not decided, or even discussed, in relation to the creation and determination of a tenancy at will.

So where land is purchased by one person in the name of, and is conveyed to another, and the purchaser takes possession (*z*), or where a contract is entered into for a lease, and, pending the execution of the lease, the intended lessee is let into possession (*a*), and there is no payment of rent in such a mode as to create a tenancy from year to year (*b*), a tenancy at will between the person to whom the land is conveyed and the purchaser, in the former case, and between the intended lessor and the intended lessee, in the latter case, arises.

Tenancies from year to year or other period without lease in writing.

In the case of a tenancy from year to year or other period without any lease in writing, the right of the person entitled to the land or the rent, subject to such tenancy, first accrues at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy has been received, whichever last happens (*c*), although, inde-

(*t*) *Saunders v. Musgrove*, 6 B. & C. 524.

(*u*) *Howard v. Shaw*, 8 M. & W. 118.

(*x*) *Repley v. Waterworth*, 7 Ves. 425; *Doe d. Tomes v. Chamberlaine*, 5 M. & W. 14; *Howard v. Shaw*, supra; *Roe d. Blair v. Street*, 4 Nev. & M. 42; *Doe d. Stanway v. Rock*, supra; *Toft v. Stephenson*, 7 Hare, 1, 1 De G., M. & G. 28, on appeal.

(*y*) Vide supra.

(*z*) *Lamplugh v. Lamplugh*, 1 P. W. 111.

(*a*) *Doe d. Landsell v. Gower*, 17 Q. B. 589; *Braythwaite v. Hitchcock*, 10 M. & W. 494. See also *Davis v. Shepherd*, 35 L. J., N. S. 581.

(*b*) *Knight v. Bennett*, 3 Bing. 861; *Braythwaite v. Hitchcock*, supra.

(*c*) Sect. 8, 3 & 4 Will. 4, c. 27.

pendent of the statute, in strictness, there would not be necessarily any right to enter at either of these periods (*d*).

The time when the right first accrues, in this case, differs from the time when the right first accrues in the case of a tenancy at will. In the latter case, as just shown, the accruer is in an alternative event, the determination of the tenancy either by the party or by the statute itself, whilst here the accruer is on whichever of two events *last* happens, that is, either on the determination of the first period of the tenancy or on the last payment of the rent in respect of it (*e*), more than, although the death of the landlord happened within twenty years before the action brought (*f*), and although the last payment of the rent was more than twenty years before the passing of the act (*g*).

Difference as to accruer of right between these tenancies and tenancies at will.

The remark already made as to the lease of a rent at will is equally applicable to such a lease when for years, which is also contemplated by the sect. 8, and in it the term rent is used both in the sense of a rent of inheritance as distinct from the land, as in the sect. 1, and of a rent reserved on a common demise (*h*).

Of a rent.

Independently of express contract, a tenancy from year to year may be created by implication, as by possession under a demise, void as a lease by reason of the Statute of Frauds, and paying rent accordingly (*i*), or perhaps even without paying it (*j*), or, if the lease be in writing, but not by deed (*k*), or, when for less than three years, the rent reserved does not amount to two-thirds, at least, of the improved value of the demised pre-

How yearly tenancies created.

(*d*) See *Owen v. De Beauvoir*, 16 M. & W. 547.

(*e*) See 16 M. & W. 561.

(*f*) *Baines v. Lumley*, 16 W.R. 674.

(*g*) *Doe d. Jukes v. Sumner*, 14 M. & W. 39.

(*h*) 9 Q. B., N. S. 356; *Baines v. Lumley*, 16 W. R. 674.

(*i*) See *Doe d. Riggs v. Bell*,

5 T. R. 471; *Richardson v. Gifford*, 1 Ad. & E. 52; *Beale v. Sanders*, 3 Bing. N. C. 850; *Arden v. Sullivan*, 14 Q. B. 822; *Doe d. Davenish v. Moffatt*, 15 Ib. 257.

(*j*) See *Knight v. Bennett*, 3 Bing. 38.

(*k*) 8 & 9 Vict. c. 106, s. 2.

mises (*h*); or by the determination of the estate of the lessor (*l*), or of the lessee (*m*), and the tenant continuing the possession and paying the rent to the person entitled to the reversion, the tenancy from year to year may be considered as commencing, either from the time of the original contract, or with any particular year of the tenancy (*n*); or as recommencing every year (*o*), and perhaps as a continuing tenancy.

A writing on such a tenancy must not create an interest.

If the tenancy be under a lease in writing, that is, not merely an instrument which would be evidence of the conditions of holding, but one passing an interest, the tenancy is not within the sect. 8. If not under such a lease, but only an instrument amounting to such evidence merely, or to a mere agreement for a lease, and the holding be for a determinate period, either express or implied, the tenancy would be within this section, determinable at the end of the first period, or on the last receipt of the rent. Therefore, where a tenancy is thus created from month to month, by implication, and no rent is paid in respect of the tenancy, the right first accrues at the end of the first month, and is barred on the expiration of twenty years from that time (*p*).

Accrues on underletting by yearly tenant.

Where a tenant from year to year or other definite period underlets, gives possession to the under-tenant, and makes the last payment of rent within twenty years before action brought to recover the land, and the under-tenant, within that period, admits his tenancy but pays no rent, and holds possession for more than twenty years, the right of the original lessor first accrues on

(*h*) *Stratton v. Pettitt*, 16 C. B. 420; *Lee v. Smith*, 9 Ex. 663; *Tress v. Savage*, 4 Ell. & B. 36; *Davis v. Jones*, 17 C. B. 632; *Taswell v. Parker*, 2 De G. & J. 559; *Bond v. Rosling*, 1 Best & S. 371; *Burton v. Reeve*, 16 M. & W. 807.

(*l*) *Oakley v. Monck*, 4 Ex., N. S. 251.

(*m*) See *Archbold v. Scully*, 9 H. L. C. 348.

(*n*) See *Cattley v. Arnold*, 1 John. 651, and the cases there cited.

(*o*) Per Patteson, J., 8 Car. & P. 729.

(*p*) See *Doe d. Landsell v. Gower*, 17 Q. B. 589; also *Ley v. Peter*, 8 Ex., N. S. 101.

such payment, and is not affected by such possession; and his title being valid against his tenant, the under-tenant, after such admission, cannot dispute that title (*q*).

A person holding of parish officers a house, in consideration of the performance of a service, as cleaning the parish church (*r*), or ringing the church bell (*s*), is a tenant from year to year within the sect. 8; and the service being performed, the right accrues from the last time of the performance.

What is such a tenancy within section 8.

The rent payable and receivable by and from the tenant under the sect. 8, may be, either in money, or in services to be performed by him, as sweeping a church (*t*), or ringing a church a bell (*u*), or keeping up a grindstone for the lessor, but not for a stranger (*x*).

What is rent payable under that section.

The rent payable and to be received within the sect. 8 is to be in respect of the tenancy contemplated by that section, and as for rent due for the property held under the tenancy—*Quicquid solvitur, solvitur secundum animum solventis*; and if, on looking to the facts of the case, it is plain that the payments have been made *secundum animum solventium*, not for rent, but on another account, the doctrine of estoppel arising from payment of rent has no place. Where, therefore, a tenancy is disputed, the circumstances connected with the annual payments are most important, for if the person paying made the payments, expressly or impliedly, on account of something else than rent of land of which he is the tenant, this would not be a payment of rent within the meaning of this section, and a defence founded on the statute would be a complete bar (*y*).

(*q*) *Doe d. Earl Spencer v. Beckett*, 4 Q. B. 601.

(*r*) *Doe d. Edney v. Benham*, 7 Q. B., N. S. 976.

(*s*) *Doe d. Edney v. Billett*, *Ib.*

(*t*) *Doe d. Edney v. Benham*, *supra*.

(*u*) *Doe d. Edney v. Billett*, *supra*.

(*x*) See *Doe d. Robinson v. Hinde*, 2 Moo. & Rob. 441.

(*y*) *Att.-Gen. v. Stephens*, 6 De Gex, M. & G. 111. See also *Doe d. Newman v. Gopsall*, 4 Q. B., N. S. 608, n.; 5 Jur. 170, S.C.

Whether that
section extends
to such
tenancies
without rent.

The sect. 8 may be thought to embrace those cases only where the tenancy is at a rent, and not those where the tenancy is without any rent, or anything in the nature of a rent, in respect of it. The terms of the section contemplate, in every case, two things, the tenancy itself, and a rent in respect of it, and then makes the right first to accrue on whichever of two events shall last happen. But in the case of a tenancy without any rent, or anything in the nature of a rent, if within the section, the right must first accrue, not as in the former case, but on the determination of the first period of the tenancy alone, or not at all, and therefore that such tenancies are not within this section. On the other hand it may be urged that as rent may be in the delivery of a profit that lieth in render, office, attendance, and such like (*z*), and for the nonperformance of a rent service a distress may be made (*a*), and on a tenancy without rent the lessor has fealty (*b*), which is an inseparable incident to the reversion (*c*), indeed, to every tenure, except frankalmoigne and at will (*d*), and still remains (*e*), and although the fealty in the case supposed, when not expressly reserved, arises by law, and not by, yet out of, the contract of the parties and from the tenure, and the time when such service was last rendered may be uncertain or difficult to ascertain, yet that such tenancies are within this section. If not, the right will first accrue when, upon the determination of the tenancy in the usual course of law, the reversion comes into possession.

When a yearly
tenancy may
be created by a
cestui que
trust.

A *cestui que trust*, not in the actual possession of the land, or receipt of the rent (*f*), but acting merely as the agent or bailiff of the trustee (*g*), in the receipt of

(*z*) Co. Litt. 98 a, b, 142 a;
Doe d. Edney v. Benham, supra;
Doe d. Edney v. Billett, 7 Q. B.,
N. S. 976.

(*a*) Co. Litt. 142 a.

(*b*) Litt. s. 132.

(*c*) Co. Litt. 23 a, 98 a, b, 143 a,

150 b, 151 b.

(*d*) Litt. sects. 131, 132.

(*e*) Vide ante, p. 348.

(*f*) *Garrard v. Tuck*, 8 C. B.
251.

(*g*) See *Pope v. Biggs*, 9 B. &
C. 245.

the profits from the actual holders, and managing the property (*h*), may create a tenancy from year to year; and in that case the right, not only of the *cestui que trust*, but of the trustee also (*i*), first accrues at the end of the first year of the tenancy, or on the last payment of rent, although such payment was more than twenty years before the passing of the act (*k*).

It is apprehended that a *cestui que trust*, becoming a tenant from year to year or other definite period, may, under this sect. 8, acquire an absolute title at law against his trustee. There is no express exclusion of such a tenancy between such parties, as of a tenancy at will, from the sect. 7, and the tenancy from year to year, or other definite period, arises by the contract of the parties, whilst a tenancy at will is created, by construction of law, from the mere relation of the parties (*l*).

Whether he can acquire, under that section, a title against the trustee.

In the case of a tenancy of land, or of a rent under a lease in writing, reserving a rent amounting to the yearly sum of 20*s.* or upwards, which is received by some person wrongfully claiming the land, or the rent, in reversion immediately expectant on the determination of the lease, and no payment of the rent reserved is afterwards made to the person rightfully entitled thereto, the right of the person entitled to the land, or the rent, subject to the lease, on its determination, first accrues when the rent reserved by the lease was first so received by the person so wrongfully claiming; and the right, which before this statute would accrue on the determination of the lease, notwithstanding such receipt (*m*), is expressly excluded (*n*).

Tenancies under leases in writing at a rent of 20*s.* and upwards.

(*k*) *Melling v. Leak*, 16 C. B. 652.

(*i*) See *Melling v. Leak*, *supra*; *Doe d. Jukes v. Sumner*, 14 M. & W. 39.

(*k*) *Doe d. Jukes v. Sumner*, *supra*.

(*l*) Vide ante, pp. 471 *et seq.*, 476.

(*m*) *Orrell v. Maddox*, 3 Cru. Dig. tit. xxxi. c. ii. s. 30; *Doe d. Cook v. Danvers*, 7 East, 299; *Chadwick v. Broadwood*, 3 Beav. 308; 2 Con. & L. 191. But see *Cholmondeley v. Clinton*, 1 Turn. & R. 116; 3 Beav. 314, arg.

(*n*) Sect. 9, 3 & 4 Will. 4, c. 27;

The nature of
the lease,

The lease must be one which passes an interest and not a mere agreement for a lease, or an instrument merely showing the conditions of the holding (*o*), and be by deed (*p*).

—and the rent
reserved.

In this provision the term rent is used three times in the sense of rent within the sect. 1, and four times in the sense of a rent reserved on a common demise (*q*), and then of a pecuniary nature only; for so reserved it is to amount to the yearly sum of 20*s.* and upwards, and to be received and paid. Therefore, if so, a lease reserving a rent in money's worth only (*r*), as in a lease of mines reserving part of the produce in a manufactured state (*s*), or other profit lying in render, office, attendance and such like (*t*), which cannot, in some cases at least, as for instance, fealty, be estimated in money value, is not within this section, and the profit, if rendered to a third person claiming wrongfully, the mines or other property to which the profit is incident would not affect the right of the lessor to enter on them on the expiration of the lease. If such a lease be within the section, his right would first accrue on the render to such person, independent of the time of the sale of the produce of the mine (*u*). The reservation in such a lease of a part of the produce of the mines not in a manufactured state is not however properly a rent, or in the nature of a rent, but an exception of part of the mine or land itself (*x*); and a sum in gross re-

Doe d. Angell v. Angell, 9 Q. B., N. S. 328. See also *Grant v. Ellis*, 9 M. & W. 127; *Scott v. Nixon*, 2 Con. & L. 185; *Chadwick v. Broadwood*, 3 Beav. 308.

(*o*) See *Doe d. Lansdell v. Gover*, 17 Q. B. 589.

(*p*) 8 & 9 Vict. c. 106, s. 3.

(*q*) See *Doe d. Angell v. Angell*, 9 Q. B., N. S. 328; *Baines v. Lumley*, 16 W. R. 674.

(*r*) See *Cumberland v. Kelly*, 3 B. & Ad. 602.

(*s*) Co. Litt. 142 a. See *Denys v. Shuckburgh*, 4 You. & C., Ex. 42; 5 Jur. 21, *S. C.*

(*t*) Co. Litt. 142 a; *Doe d. Edney v. Benham*, 7 Q. B., N. S. 976; *Doe d. Edney v. Billett*, *Ib.* 983; *Doe d. Robinson v. Hinde*, 2 Moo. & R. 441.

(*u*) *Denys v. Shuckburgh*, *sup.*

(*x*) Co. Litt. 42 a.

served and made payable in such a lease, by instalments, is not necessarily a rent (*y*).

The rent must be also expressly reserved. If therefore, a service, when so reserved, be a rent within this provision, a service merely incident to the tenure by law, as fealty (*z*), must, as it may (*a*), be expressly reserved. If not so reserved, and the lease do not reserve any money rent, the lease is not—as a tenancy under sect. 8 with such a service may be within that section (*b*)—within this sect. 9. If such service, when expressly reserved, be rent reserved within the meaning of the sect. 9, and be performed for more than twenty years to a person wrongfully, and not within that period rendered to the person rightfully, claiming the land, the latter person will be barred of his reversion on the determination of the lease. But the service itself, arising on such a tenancy, is not within the statute (*c*).

Rent must be expressly reserved,

As under the sect. 8, so under the sect. 9, the payment and receipt of the rent must be for rent, *quod* rent, and not otherwise (*d*).

—and *quod* rent.

If arrears accrue which are afterwards paid up, payment of rent continued to the person so wrongfully claiming the land would be a continued receipt for the purposes of the statute (*e*).

What a continued receipt of it.

As the case of a tenancy from year to year, without a lease in writing, and without rent, may not be within the sect. 8 (*f*); so the case of a tenancy under a lease in writing, at a rent less than 20s. yearly, or without any rent, may not be within this sect. 9 (*g*).

Such tenancies at a rent less than 20s., or without rent.

The right under this sect. 9 accrues on the first payment of the rent reserved by the lease, being to a third person wrongfully claiming the demised premises, and

(*y*) *Lord Hatherstone v. Bradburne*, 18 Sim. 599.

(*z*) *Vide supra*, p. 348.

(*a*) *Bevil's case*, 4 Rep. 8.

(*b*) *Vide supra*, p. 481.

(*c*) *Grant v. Ellis*, 9 M. & W. 127. See also 16 Ib. 566.

(*d*) *Vide supra*, p. 481.

(*e*) *Scott v. Wilson*, 2 Con. & L. 185.

(*f*) *Vide supra*, p. 482.

(*g*) See 8 Ir. L. R. 458; *Crosbie v. Sugrue*, 9 Ib. 17; *Ex parte Jones*, 4 You. & Coll. 466.

would not accrue on mere attornment (*h*) to such person (*i*), which, however, might operate a disclaimer of the lessor's title, and a forfeiture of the lease, and thus give to him, on having notice of the attornment (*j*), an immediate right of entry, although he might decline to exercise it, and wait until the expiration of the lease by effluxion of time (*k*), and unless the rent be so paid the right to the reversion, and to the rent as incident to it, remain unaffected (*l*); although, if the lessee be in possession for twenty years or upwards without paying any rent to either the lessor or any other person, the lessor cannot maintain ejectment against the lessee for non-payment of rent (*m*); and yet on the expiration of the lease without any such payment, or within twenty years after such expiration, the lessor may recover the demised premises (*n*). Lord Abinger, C. B., seems to have thought otherwise (*o*).

In *Doe v. Ozenham*, the rent reserved by the lease had been paid for some years. But in *Doe v. Bingham* no payment of rent by the lessee to any one was proved. The lease was made in 1796, and at the trial the lessee claimed under a conveyance made to and accepted by him in 1805, which was a forfeiture of his lease (*p*), and available for the lessor, after notice of it, although not bound to enforce it, or to enter until the expiration

(*h*) 11 Geo. 2, c. 19.

(*i*) 9 H. L. C. 381.

(*j*) See *Hovenden v. Lord Annesley*, 2 Sch. & L. 624; *Merrett v. Gilpin*, 6 Pri. 148.

(*k*) Vide ante, pp. 452, 453, 454.

(*l*) See *Grant v. Ellis*, 9 M. & W. 127; *Doe d. Davy v. Ozenham*, 7 Ib. 131; *Doe d. Newman v. Gopsall*, 4 Q. B., N. S. 603, n.; 5 Jur. 170, S. C.; *Crosbie v. Sugrue*, 9 Ir. L. R. 17; *Fulton v. Creagh*, 3 J. & L. 329; *Archbold v. Scully*, 9 H. L. C. 360; *Kennedy v. Woods*, Ir. Rep., 1 C. L. 76.

(*m*) *Doe d. Mannion v. Bingham*, 3 Ir. L. R. 456. On this case vide ante, pp. 462, 463.

(*n*) *Doe d. Davy v. Ozenham*, 7 M. & W. 131.

(*o*) *Ex parte Jones*, 4 You. & C. 466.

(*p*) See Com. Dig., tit. Forfeiture, A. 4, 5; Co. Litt. 252 a; 9 Rep. 106 b; *Doe d. Gray v. Stanion*, 1 M. & W. 695; *Doe d. Williams v. Cooper*, 1 Scott, N. R. 36; *Jones v. Mills*, 10 C. B., N. S. 788; *Doe d. Ellorbrock v. Flynn*, 4 Tyr. 619.

of the lease (*q*). This point, however, was not urged for the plaintiff, and the court appears to have treated the case as of a right of entry on nonpayment of rent given by the lease, and as having first accrued to the lessor in 1797, the year after the date of the lease. *Doe v. Bingham*, however, appears to be overruled by the cases of *Grant v. Ellis*, in England, and *Daly v. Blomfield* (*r*) and *Crosbie v. Sugrue* (*s*), in Ireland. In the last case and in *Doe v. Bingham*, the action was *ejectment for nonpayment of rent*, which appears to be equivalent to an action in England for the recovery of the rent, and distinct from an action of ejectment for the recovery of the demised premises themselves. In *Doe v. Bingham*, the action was treated as for the recovery of the land, but in *Crosbie v. Sugrue*, the court said that treating the action as merely for the land was an assumption; and that it was for nonpayment of rent and not for the possession of the land, and therefore within the principle of *Grant v. Ellis*, and the subsequent cases which determined that conventional rents are not within the statute.

So where a stranger enters into part of the demised premises, but not under, or in privity with, either the lessor or the lessee, and continues the possession until the expiration of the lease without paying any rent to any person, or receiving any from the lessee, the right of the lessor, on the expiration of the lease, would be unaffected, although the right of the lessee, at the end of twenty years from the lease taking effect, would be barred (*t*).

The right under this 9th section may have first accrued, and have been lost, long before the passing of this act. In other words this provision is retrospective (*u*).

When an acknowledgment of the title of the person

Right under section 9 created and lost before the act.

Acknowledgment of title.

(*q*) 2 Sch. & L. 99; *Doe* d. *Cooke v. Danvers*, 7 East, 299.

(*t*) See 15 Ir. L. R. 270.

(*r*) 5 Ir. L. R. 65.

(*u*) *Doe* d. *Angell v. Angell*, supra.

(*s*) 9 Ib. 17.

entitled to the land or the rent is given in writing by the person in the possession of the land or the receipt of the rent, the right of the former person first accrues when such acknowledgment, or, if more than one, the last (*x*), is given (*y*).

This section provides a mode or modes for the landlord preserving his title without taking possession, and contains no words which prevent the operation of the other part of the statute, which, if a claimant enters effectively, and not colourably, gives him twenty years from that time before his title is barred (*z*).

Effect of.

The moment after the acknowledgment is given, all presumption arising from the length of possession instantly ceases (*a*), and a new right first accrues to the person whose title is thus admitted (*b*); but the acknowledgment must be renewed within twenty years from the time of giving it, or the right will be lost, and the time does not stop upon the acknowledgment being given (*c*).

When considered as given.

When the acknowledgment is given by deed, the time of the execution, and not the time of the date, will be the time of giving the acknowledgment (*d*).

As the 14th section of c. 27 makes the right to accrue at the giving of an acknowledgment, so the 1 Vict. c. 28 gives the like effect to a payment of principal or interest (*e*).

Must be of an existing right.

Inasmuch as all right or title which have first accrued twenty years ago or upwards to land or to rent is extinguished (*f*), the title acknowledged must have existed within that period from the giving of the acknowledgment (*g*). But in the case of a mortgage, the payment of any principal or interest gives a new right

(*a*) *Incorporated Society v. Richards*, 1 Dru. & War. 258.

(*y*) Sect. 14, 3 & 4 Will. 4, c. 27.

(*z*) See *Locke v. Matthews*, 13 C. B. 753.

(*a*) 1 Con. & L. 84.

(*b*) 1 Jo. & Lat. 304.

(*c*) See *Scott v. Nixon*, 2 Con. & L. 185.

(*d*) *Jayne v. Hughes*, 10 Ex. 480.

(*e*) 2 Con. & L. 147.

(*f*) Sect. 34.

(*g*) See *Hobson v. Burns*, 13 Ir. L. R. 286.

for twenty years, although more than that period has elapsed since the right first accrued, and before such payment (*h*).

When the possession of an advowson has once commenced adversely, and continues of that character during the whole of the prescribed period of limitation, no intermediate acknowledgment of the title of the rightful patron, as in the case of land and rent under the sect. 14, will give to him any new right.

The time when the right to land or to a rent, within the meaning given to those terms in the sect. 1, first accrues is, as will have been observed, generally with reference to the possession, or the receipt of the profits of the land, and to the receipt of the rent.

Time of accrual of right has reference to certain facts:

As respects land, the statute has been careful to prevent persons who have enjoyed a long uninterrupted possession from being turned out upon frivolous prettexts, or by a mere assertion of right unaccompanied by some act effectual for excluding the actual possessor from the possession, as by mere entry on the whole or on a part for the whole (*i*), to avoid a fine by stepping on any corner of the land in the night time, and pronouncing a few words without any attempt or intention or wish to take possession (*k*), or otherwise (*l*), or by continual or other claim upon or near the land (*m*), has enacted that mere entry on is not to be deemed, within the meaning of the act, possession of the land (*n*), and has excluded the preservation of the right to the land by means of any such claim (*o*).

—to possession. Sections 10 and 11.

The sect. 10 derives light from, and is to be read with, the following section, and seems to require some-

(*h*) 1 Vict. c. 28.

(*i*) Co. Litt. 15 a, b.

(*k*) See *Randall v. Stevens*, 2 E. & B. 641.

(*l*) See *Thorp v. Facey*, 13 Jur., N. S. 741; 1 H. & R. 678, S. C.

(*m*) Litt. sects. 414, 417, 419, 420; Co. Com. 250 a, *et seq.*

(*n*) Sect. 10; *Look v. Matthews*, 18 C. B., N. S. 763; *Brasington v. Llewellyn*, 27 L. J., Ex. 297; *Thorp v. Facey*, *supra*.

(*o*) Sect. 11.

thing more than the mere formally going upon the land. The making an entry amounts to nothing unless something is done to divest the possession out of the holder and revest it in the claimant. The sect. 11, treats the making an entry as something more than merely being on and claiming the land (*p*). When these two sections are read together, it is clear that they apply to the entry spoken of in the 417th section of Littleton and Lord Coke's Commentary thereon (*q*).

The acts of the claimant, in addition to his entry, must be of such a nature as will restore his right. Therefore, where, after a possession of more than twenty years against a claimant, he entered on the land, in the absence of the possessor himself, but his family, being there, claimed the land, and directed a stone to be severed from a wall, and part of a fence to be removed, but did not remove the family nor desire it to remove, these acts were held to amount to no more than an entry, and insufficient to restore the right of the claimant (*r*). The claimant, however, could not, by any act of his own merely, have revived or restored his right, for it was extinguished by the possession of more than twenty years (*s*), and he therefore became a mere trespasser (*t*).

But where the possession has been for less than twenty years, and the possessor and his family and the whole of his goods are removed by the claimant, that is a sufficient resumption of possession by the claimant, and destroys the title gained by the previous possession; and although the person so turned out, resumed the possession on the same day, the claimant has a new right of entry for twenty years from the time of such resumption; and where the possession is actually taken *animo possidendi*, the duration of it is immaterial (*u*).

(*p*) 9 C. B. 718.

(*q*) 18 C. B., N. S. 766.

(*r*) *Doe d. Baker v. Coombes*,
9 C. B. 714.

(*s*) Sect. 34.

(*t*) See 2 Ell. & B. 650.

(*u*) *Randall v. Stevens*, 2 Ell.
& B. 641.

A declaration in ejectment amounts to a mere entry only, and a judgment by default in such an action, unless executed, does not give possession (x).

The possession of land against the rightful owner commencing by the mere erection of a fence upon the land, and shown solely by such fence, is restored to him by an entry within twenty years after such possession upon the land, the removal of the fence and the erection of a post by such owner, without any subsequent act on the land for five years hostile to, and without any further act of possession by such owner, and is not such a possession as is to be deemed a mere entry within the section 10 (y).

The occasional residence by the person entitled with the person in possession, coupled with acts of such person amounting to an admission of title in the person entitled, prevents the possession operating against him (z).

Irrespective, however, of entry or of the claim, or of the receipt of the whole of the profits of any land, or the receipt of any rent within the meaning of the section 1 of the 3 & 4 Will. 4, c. 27, by any one or more exclusive of any other or others of any persons claiming the land or the rent as coparceners (a), joint tenants (b) or tenants in common (c), the possession or the receipt by any of such persons of the entirety, or of more than his or their undivided share or shares of the land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any other person, other than

—by joint
owners.
Section 12.

(x) *Thorpe v. Facey*, supra.
(y) *Worsam v. Vandenbrande*,
17 W. R. 53.

(z) *Doe d. Groves v. Groves*,
10 Q. B. 486; 16 L. J., N. S., Q.
B. 297; 11 Jur. 558.

(a) *Doe d. Jacobs v. Phillips*,
10 Q. B., N. S. 130; *Woodroffe*
v. Doe d. Daniell, 15 M. & W.
769; et à contra, 2 H. L. C. 811.

(b) *Murphy v. Murphy*, 15 Ir.
L. R. 205.

(c) *Culley v. Doe d. Taylerson*,
11 Ad. & E. 1008; *Stewart v.*
Marquis of Conyngham, 1 Ir. Eq.
Rep., N. S. 534; *Lessee O'Sullivan*
v. M'Swiney, Longf. & T.
111; *Doe d. Holt v. Horrocks*, 1
Car. & K. 566; 9 H. L. C. 360;
Ley v. Peter, 3 Ex., N. S. 101;
Tidball v. James, 29 L. J., N. S.,
Ex. 91. On this last case see
Murphy v. Murphy, supra.

the person or persons entitled to the other share or shares of the same land or rent, is not, as formerly (*d*), the possession of, or the receipt by the other or others (*e*); and consequently the entry of one cannot have the effect of vesting the possession in the other (*f*), and the land being of gavelkind tenure makes no difference (*g*).

This section applies, not merely to the case where the possession is of the entirety of the whole property held jointly or in common, but equally to the case of the exclusive possession of the entirety of any portion of the property so held; and the words, "more than his undivided share," apply only to the case of the possession of an undivided share greater than that which the possessor is really entitled to (*h*).

But where one tenant in common, holding under a lease the undivided share of another tenant in common, and by paying no rent reserved by the lease takes all the profits, acquires no title to such share by such receipt for more than twenty years, although he would have done, if there had been no such lease (*i*).

Effect of that section.

This section 12, as respects joint tenants, puts an end to an old question which may be a matter of curiosity to inquirers, viz. the meaning of *per my et per tout* (*k*). The generality of the terms of this section seems sufficient to negative such possession, not merely for the purposes of the act but for every purpose. This section does not extend to advowsons (*l*).

Possession by relations.
Section 13.

So, also, the possession or receipt of the profits of land, or the receipt of a rent, by a relative of the person entitled as heir to such possession or receipt, is not, as

(*d*) Vide ante, Book II. Chap. V.

(*e*) Sect. 12.

(*f*) *Woodroffe v. Doe* d. *Daniell*, 15 M. & W. 769; et à contra, 2 H. L. C. 811.

(*g*) *Doe* d. *Jacob* v. *Phillips*, supra.

(*h*) *Murphy* v. *Phillips*, 15 Ir.

L. R. 205; 11 L. T., N. S. 191, S. C.

(*i*) *Archbold* v. *Scully*, 9 H. L. C. 360.

(*k*) 11 L. T., N. S. 191. See 7 C. B. 455, n.

(*l*) See 8 Cru. Dig. 20; ante, pp. 283, 284, 359.

formerly (*m*), the possession or receipt of or by the person so entitled (*n*).

The effect of this section is to make the younger brother or other relation of the person entitled as heir, tenant at will to such person (*o*), and then the section 7 would apply.

This section would seem from the generality of its terms to negative such a possession, not merely for the purposes of the act but for every purpose. Hence, as was said in *Doe d. Palmer v. Eyre* (*p*) *arguendo*, that the section had abolished *possessio fratris* or *sororis* (*q*), although, as Lord Campbell, C. J., remarked (*r*), not retrospectively. But such abolition, whether accomplished or not, is, since the 3 & 4 Will. 4, c. 105, immaterial. The section, however, does not extend to advowsons.

The possession, or the receipt of the profits of land, or the receipt of a rent by a person giving an acknowledgment in writing of the title of the person entitled to the land or the rent in the manner prescribed by the statute, is the possession or the receipt of the person so entitled according to the meaning of the statute (*s*).

—by person giving acknowledgment.
Section 14.

This section 14 unites to the title of the person to whom the acknowledgment is given, the possession or the receipt of the profits of the land, or the receipt of the rent by the person giving the acknowledgment, so as to put the former person in the present actual possession or receipt (*t*).

Effect of that section as to possession.

The receipt of rent payable by a tenant from year to year or other lessee is, as against such lessee or any person claiming under him, but subject to the lease,

Effect of receipt of rent as to tenant.

(*m*) Litt. ss. 896, 897, 898.

(*n*) Sect. 18.

(*o*) *Doe d. Palmer v. Eyre*, 17 Q. B. 816.

(*p*) 17 Q. B., N. S. 816.

(*q*) Co. Litt. 14 b, 15 a, b.

(*r*) 13 Jur. 1081.

(*s*) Sect. 14.

(*t*) See *Hobson v. Burns*, 13 Ir. L. R. 286.

the receipt of the profits(*u*) of the *land* for the purposes of the act (*v*).

But when rent within the meaning of the section 1 is, as it may be (*w*), the subject of the tenancy, the statute is silent as to the effect of the receipt of the rent payable by the tenant, and therefore such receipt may not be the receipt of the rent the subject of the tenancy.

Accruer of
right to equit-
able titles.

The period of limitation for land and rent being the same in equity (*x*) as at law, and, by reference, includes those provisions which determine, in the latter jurisdiction, when the right first accrues, and all the preceding observations are applicable to cases of equitable right, modified only, as may be requisite, by the nature of the right.

In the former Statute of Limitations (*y*), when adopted in equity, right and title of entry did not mean there a right to go upon the land and take possession of it in the form of the old entry at common law; but meant the right of instituting a suit in equity upon the subject, because the title being with respect to a right in equity, such was the mode of asserting the title in that jurisdiction (*z*); and the language of the section 24 corresponds with this view.

The statute deals generally with equitable rights, treats them as co-ordinate with legal ones, and, in the case of mortgages, provides with respect to the remedies for the recovery of the estate, and of the money, and equally so when both remedies are enforced in equity (*a*).

Effect of
section 24.

The section 24 is as imperative as the enactment in relation to legal rights (*b*), takes up the case of those equitable rights which are distinguishable from the equitable rights of *cestuis que trust* under express

(*u*) See sects. 3, 5, 7, 8, 9, 12,
13, 14, 15, 23, 28.

(*v*) Sect. 35.

(*w*) Vide supra, pp. 344, 473.

(*x*) Sect. 24.

(*y*) 21 Jac. 1, c. 16.

(*z*) 4 Bli. Rep. 118.

(*a*) See 2 Jo. & Lat. 195;

Wrixon v. Vize, 2 Con. & L. 149.

(*b*) 2 Jo. & Lat. 195.

trusts(c), operates a bar so far only as the equitable rights would be barred if legal ones(d), throws, in connexion with the section 28, light upon the intention of the act, and, as respect mortgages, would apply to only equitable mortgages; but the intention was clear to include both legal and equitable mortgages, and no difficulty arises in giving the section the enlarged construction. The 1 Vict. c. 28, adopts and treats legal rights and equitable ones as co-ordinate. The right, whether legal or equitable, falls within the 24th section and the 1 Vict. c. 28; and the time is limited by the legal right to bring an action, or if there be no legal right, by the time which would be allowed in case such legal right existed. A legal mortgage, if not within this section, is a *casus omissus*, and equity would once more adopt the legal rule by analogy(e).

As a fine by an equitable tenant in tail could not operate a bar to the reversion in a third person, therefore in such a case the section 23, which is not retrospective(f), would not apply; and as such a fine operates neither a discontinuance(g) nor a disseisin(h), the owner of the reversion expectant on the base fee created by such fine is not deprived of his remedy under the section 38(i). The court, however, in the last case, thought that as the reversion would have been barred had the estate tail been legal, there was ground to contend that a court of equity should hold the equitable reversion after the equitable estate tail also barred.

The right to an estate in remainder(j) and in rever-

Remainders
and reversions.

(c) 4 Hare, 155.
(d) *Archbould v. Souilly*, 9 H. L. C. 360.
(e) *Wrixon v. Vize*, 2 Con. & L. 138.
(f) 2 V. & P. 358, Ed. 10;
Penny v. Allen, 7 De G., M. & G. 409.
(g) 16 Ves. 224; 2 Ves. sen.

472; *Hopkins v. Hopkins*, 1 Atk. 591; 1 Pres. Ab. 146.
(h) 2 Jac. & W. 18, 138; 2 Mer. 355.
(i) 2 V. & P. 358, Ed. 10;
Stewart v. Marquis of Conyngham, 1 Ir. Eq. R., N. S. 534.
See *supra*, pp. 460, 461.
(j) *Thompson v. Simpson*, 1 Dru. & War. 459.

sion (*k*), in equity, first accrues when the estate comes into possession (*l*).

Charges on land.

A charge on land is an interest in land, and therefore land within the sections 1 and 24 (*m*), and where payable on the death of a tenant for life, the right to such charge first accrues on the death of such tenant (*n*). But a charge on a rent would seem not to be within these sections, unless the charge can be considered, *pro tanto*, a part of the rent itself; for by the former of these two sections the term rent is not made expressly to extend, like the term land, to any estate or interest therein, whether freehold or chattel.

In constructive trusts.

The time when the right first accrues under a constructive trust to be made out by circumstances, and not resulting under an express trust (*o*), is regulated by the section 24.

In express trusts.

Courts of equity having exclusive jurisdiction in matters of trust, and concurrent jurisdiction with courts of law in cases of fraud, specific provisions determining when the right is to be deemed to first accrue in such matters and cases, but in the latter when cognizable in equity only, are contained in the 3 & 4 Will. 4, c. 27, and now to be considered.

As to right of *cestui que* trust.

Where land or rent, subject to an express trust, is sought to be recovered in equity, the right of the *cestui que* trust to recover first accrues when the land or the rent is conveyed to a purchaser for valuable consideration (*p*).

In this provision the terms "express trust" are used by way of opposition to trusts arising by implication, trusts resulting, or trusts by operation of law. The elements of any given case within this provision are (1) either

(*k*) *Stewart v. Marquis of Conyngham*, *supra*.

(*l*) See also *Duke of Leeds v. Earl Amherst*, 2 Phill 117; 8 De Gex, F. & J. 72, 78.

(*m*) Vide *supra*, p. 350.

(*n*) See *Seager v. Aston*, 3 Jur., N. S. 481.

(*o*) *Salter v. Cavanagh*, 1 Dru & Wal. 668.

(*p*) Sect. 25.

land,—which includes any share, estate or interest therein, whether freehold or chattel (*q*), and therefore charges on land as well as land itself (*r*), but excludes mere pecuniary demands not so charged (*s*),—or rent, which however does not, like the term land, expressly include any share, estate, or interest therein, and therefore would seem not to include charges on rent, as well as the rent itself; (2) a trustee in whom such land or rent is vested, or a person who assumes to act, and acts, in that character (*t*); (3) an express trust thereof (*u*), declared by some written instrument (*v*) or an equivalent (*x*); and (4) a purchaser, with a conveyance for valuable consideration (*y*).

A trust resulting under an express trust (*z*) is an express trust within this provision, and the provision extends to cases where the trust is for charitable purposes (*a*).

Resulting trust, when express.

The right to a charge on land first accrues on the conveyance of the charge itself for value and not on a conveyance for value of the land (*b*).

Accrues of right to charges.

In the case of charges, wherever an estate is created in one person in trust to secure a charge for the benefit of another person, there, so long as the estate is not barred by time, the charge, although independent of the estate and the trust for raising it, it might be barred in equity,

Charges on land secured by trust and title to land not barred,

(*q*) Sect. 1.

(*r*) See *Ward v. Arch*, 12 Sim. 472; *The Commissioners of Charitable Donations v. Wybrants*, supra; *Burrows v. Gore*, 11 H. L. C. 907; *Francis v. Grover*, 5 Hare, 39. But see *Young v. Wilton*, 10 Ir. Eq. R. 10; *Dundas v. Blake*, 11 Ib. 145.

(*s*) See *Dundas v. Blake*.

(*t*) 8 De G., F. & J. 72.

(*u*) *Dickenson v. Teasdale*, 1 De G., J. & S. 52.

(*v*) *Petre v. Petre*, 1 Drew. 117.

(*x*) 8 De G., F. & J. 72.

(*y*) *Jacquet v. Jacquet*, 27 Beav. 332.

(*z*) *Salter v. Cavanagh*, 1 Dru. & Wal. 668. See also *Byrne v. Robinson*, 1 Ir. Eq. R. 333; *King v. Denison*, 1 Ves. & B. 260.

(*a*) *Att.-General v. Magdalen College, Oxon*, 18 Beav. 223; 6 H. L. C. 189, *S. C.*; *Att.-General v. Stephens*, 6 De G., M. & G. 111; *Att.-General v. Davoy*, 4 De Gex & J. 136; *Att.-General v. Payne*, 27 Beav. 168. Vide ante, p. 295; *Commissioners of Charitable Donations v. Wybrants*, 2 Jo. & Lat. 182.

(*b*) See *Commissioners of Charitable Donations v. Wybrants*, 2 Jo. & Lat. 182.

may be raised for the benefit of the person entitled; and whenever the trustee, having the right, executes the trust by taking possession, the right of the *cestui que trust* immediately accrues, and he is entitled to the full benefit of the trust (*f*).

—or barred.

But if the estate so created be barred, the charge cannot be enforced (*g*). *Accessorium sequitur principale*. A conveyance for value, however, by the beneficial owner of the land or the rent subject to the trust, especially if he himself be the trustee, will not affect the right of the *cestui que trust* of the charge (*h*).

The right of the *cestui que trust*, however, does not accrue until he himself becomes entitled to his interest in possession (*i*).

Constructive trusts excluded.

The trust, as we have seen, must be express, and therefore where the trust is constructive and to be made out by circumstances, or is not a resulting trust under an express trust (*k*), this provision does not apply; and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for the lapse of time, would be the right owner. The section has no application where the contest is between the *cestuis que trust* and third persons not being express trustees, but only *constructive* ones (*l*).

A mere charge of estates devised to a person benefi-

(*f*) *Snow v. Booth*, 2 Jur., N. S. 187; *Earl Mansfield v. Ogile*, 1 Ib. 414; *Cox v. Dolman*, 2 De Gex, M. & G. 592; *Young v. Lord Waterpark*, 18 Sim. 204; 6 Jur. 656; 10 Ib. 1; 15 L. J., N. S., Ch. 68, S. C. on app.; *Ward v. Arch*, 12 Sim. 472; *Blair v. Nugent*, 3 J. & Lat. 658; 9 Ir. Eq. Rep. 408; *Hunt v. Bateman*, 10 Ib. 860; *Playfair v. Cooper*, 17 Beav. 187; *Gough v. Bull*, 16 Sim. 823; *Burrowes v. Gore*, 11 H. L. C. 907.

(*g*) 2 De G., M. & G. 597. See

also *Burrowes v. Gore*, *supra*; 2 J. & Lat. 198.

(*h*) See 2 Jo. & Lat. 198.

(*i*) *Thompson v. Simpson*, 1 Dru. & War. 459; *Stewart v. Marquis of Conyngham*, 1 Ir. Eq. R., N. S. 534.

(*k*) *Supra*, p. 296.

(*l*) *Petre v. Petre*, 1 Drew. 371; *Tyft v. Stephenson*, 7 Hare, 1; 1 De G., M. & G. 28, S. C. on appeal; *Hunt v. Bateman*, 10 Ir. Eq. R. 360; *Dundas v. Blake*, 11 Ib. 138; *Jacquet v. Jacquet*, 27 Beav. 333; *Dickenson v. Teasdale*, 1 De G., J. & S. 52.

cially, with a direction to executors to raise a deficiency in personal estate, is not an express trust within this provision (*m*).

Apart from the personal liability of the trustee to the *cestui que trust*, presently to be noticed, the right of the latter first accrues against only a purchaser for valuable consideration and any person claiming through him, that is, deriving title (*n*), and is preserved for only twenty years from the time of the conveyance to such purchaser, whilst, as before the statute, as against the trustee and any person claiming through him without value, and whilst the relation between them continues (*o*), the right of the *cestui que trust*, in general, remains unaffected by time (*p*). The statute was not designed to interfere with the well-established principle of equity that as between an express trustee and *cestui que trust* length of times creates no bar (*q*).

Accrues
against only
purchaser for
value.

A lessee is a purchaser for valuable consideration (*r*); and on the grant of a lease by a trustee, the right of the *cestui que trust* first accrues at the time of the making of the lease (*s*).

It is apprehended that even since the 3 & 4 Will. 4, c. 27, a purchaser for value without notice of an express trust, and who has acquired the legal estate, but has been in possession less than twenty years, is, in equity,

Position, since
c. 27, of such
a purchaser
without notice.

(*m*) *Dickenson v. Teasdale*, 1 De G., J. & S. 52.

(*n*) *Petre v. Petre*, 1 Drew. 117.

(*o*) Vide ante, Chap. II. Sect. III. of this Book.

(*p*) *Att.-General v. Flint*, 4 Hare, 147; *Daly v. Kirman*, 1 Ir. Eq. R. 168; *Dillon v. Cruise*, 3 Ib. 83; *Hunt v. Bateman*, 10 Ib. 360; *Francis v. Grover*, 5 Hare, 39; *Phillips v. Mannings*, 2 Myl. & C. 809; *Petre v. Petre*, 1 Drew. 317; *Evans v. Bagwell*, 2 Con. & L. 617; *Tyson v. Jackson*, 30

Beav. 884; *Young v. Lord Waterpark*, 13 Sim. 204; 6 Jur. 656; 10 Ib. 1; *Hunt v. Bateman*, 10 Ir. Eq. R. 860; *Burrows v. Gore*, 6 H. L. C. 907; *The Commissioners of Charitable Donations v. Wybrants*, 2 Jo. & Lat. 182.

(*q*) *Hunt v. Bateman*, supra.

(*r*) *Hinde v. Collins*, cit. Cro. Jac. 181; *Reid v. Shergold*, 10 Ves. 370; Doug. 22; *Long v. Rankin*, Sug. Pow., App. 2.

(*s*) *Att.-General v. Dacey*, 4 De Gex & J. 236; *Att.-General v. Payne*, 27 Beav. 168.

still entitled to the same protection as in such cases he was before the statute.

Although by this section 25 the right of the *cestui que trust* first accrues on the conveyance by the express trustee to a purchaser for value, yet the right may also first accrue, not only against the trustee, without any conveyance, as mere possession of the land, or receipt of the rent by a third person, without value, and without any notice of the trust and by others claiming under him for twenty years, either at law (*r*) or in equity (*s*), but also, through such trustee, against the *cestui que trust* (*t*).

Personal liability of trustee remains unaffected ;

The right, when it first accrues against the purchaser for value, accrues against him alone, for the recovery of the land or the rent itself (*u*). The personal liability of the trustee from whom such purchaser claims and of all persons claiming under such trustee, whether for valuable consideration, or as mere volunteers, to the *cestui que trust*, for the breach of trust is unaffected by this statute, and is to be determined by the general doctrines of equity applicable in such cases.

It may be a question, said Brady, L. C. (*x*), whether any effectual relief can be had against a trustee who has conveyed trust property to a purchaser for a valuable consideration without any concealed fraud, and without claim preferred by the *cestui que trust* on his own behalf for a period of twenty years, whereby the title of the purchaser is irrevocably confirmed. It may be the inevitable result that as there could not then be a suit to recover the land, and the trust could no longer be executed, the only remedy which would be open would be for the breach of trust as against the trustee or against his assets.

(*r*) *Doe d. Jukes v. Sumner*, 14 M. & W. 39; *Melling v. Leake*, 16 C. B. 652.

(*s*) See 2 Jo. & Lat. 189.

(*t*) Vide ante, p. 293.

(*u*) Sect. 25.

(*x*) *Malone v. O'Connor*, 9 Ir. Eq. R., N. S. 478.

But although no time runs as between the *cestui que* —but is to be enforced within reasonable time.
trust or beneficiary and the trustee upon an express trust, so as to bar the remedy of the beneficiary, yet, with respect to claims made by him against a trustee, the general rule of equity that encouragement is not to be given to stale demands is equally applicable, and in taking an account for the purpose of charging a trustee with personal liability every fair allowance ought to be made in favour of the trustee, if it can be shown that the claim sought to be enforced is one which arose many years ago, and one of the nature and particulars of which the beneficiary was, at the time when it arose, perfectly cognizant (*y*).

Marriage, as well as money, is a valuable consideration (*z*) within this provision.

Marriage a valuable consideration.

The right to recover in equity land or rent of which any person, or any one claiming through any person, who has been deprived of it by concealed fraud, first accrues at and not before the time when such fraud is or with reasonable diligence may be known or discovered (*a*). In this provision the legislature has adopted the doctrine of courts of equity, that, in cases of concealed fraud, the person defrauded is not to be affected by it until he has had a reasonable opportunity of discovering the fraud (*b*).

Accruer of right on concealed fraud. Section 26.

Fraud is a secret thing and may remain undiscovered for a length of time, and until discovery the title to avoid it does not completely arise; and pending the concealment of the fraud time ought not in conscience to operate; the conscience of the person committing the fraud being so affected that he ought not to be allowed to avail himself of the length of time, although in some cases under certain circumstances he may be

Time until discovery of fraud.

(*y*) *McDonnell v. White*, 11 H. L. C. 579.

(*b*) *Underwood v. Lord Courtney*, 2 Sch. & L. 41; *Manby v. Bowicke*, 8 K. & J. 342.

(*z*) *Petre v. Petre*, 1 Drew. 117.

(*a*) Sect. 26.

so allowed (*a*). The case of fraud is stronger for the interference of the court than a case of mistake (*b*).

Fraud imputed
and proved,
time does
not exclude
relief.

Where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, the length of time during which the fraud has been concealed and practised would seem to be rather an aggravation of the offence, and to call more loudly upon a court of equity to grant ample and decisive relief (*c*). Every delay arising from fraud adds to the injustice and multiplies the oppression (*d*); and if the fraud be established, the court will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances attempted to protect them, whether by a decree of a court of equity, and a purchase under it (*e*), or by a judgment at law, or by other transactions between the actors in the fraud, and no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of equity depriving them of the effects of their plunder (*f*); and those who thus appropriate the property of others should be assured, that, in a court of equity, no time will secure to them the fruits of their dishonesty, but that their children's children will be compelled to restore the property of which their ancestors have fraudulently possessed themselves (*g*).

On wrongful
receipt and
conversion of
trust property.

The wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee from whom he received it, and the receiver becomes

(*a*) *Booth v. Lord Warrington*, 1 Bro. P. C. 455. See 2 Sch. & L. 635.

(*b*) 9 Hare, 176.

(*c*) Per Story, J., 5 Curt. Amer. Rep. 135.

(*d*) Per Lord Henley, C., 2 Eden, 285.

(*e*) *Kennedy v. Daly*, 1 Sch. & L. 355; *Giffard v. Hort*, Ib. 386;

Gore v. Stackpoole, 1 Dow, 18; *Colclough v. Bolger*, 4 Ib. 54; *Bandon v. Becker*, 9 Bl. N. S. 532.

(*f*) *Bowen v. Evans*, 2 H. L. C. 257.

(*g*) *Trevolyan v. Charter*, 4 L. J., N. S., Ch. 209; *Charter v. Trevolyan*, 11 Cl. & F. 740.

subject in equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself, breach of trust. But in such a case the relief is founded on fraud and not on constructive trust, and is, therefore, governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed (*h*).

Length of time, however, necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favour of innocence, and against imputation of fraud. It would be unreasonable, after great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can fairly be expected in such cases, if the parties are living, from the faculty of memory and human infirmity, is, that the material facts can be given with certainty to a common intent; and if the parties are dead, and the cases rest in confidence and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general presumptions of law for exact knowledge. Fraud, or breach of trust, ought not to be lightly imputed to the living; for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt (*i*).

Time, when a presumption against fraud and in favour of innocence.

(*h*) *Rolfe v. Gregory*, 34 L. J., N. S., Ch. 274. Rep. 135; *Langley v. Fisher*, 9 Beav. 90; *Beaden v. King*, 9 Hare, 499.

(*i*) Per Story, J., 5 Curt. Amer.

When fraud
considered to
be discovered.

Until the fraud is discovered time does not operate; but the fraud is considered to be discovered when such reasonable notice of what has happened has been given to the person injured, as to make it his duty, if he intend to seek redress, to make inquiry, and to ascertain the circumstances (o). After the discovery of the fact, imputed as fraud, the party in possession has a right to avail himself of the Statute of Limitations; he has a right to say, "you shall not bring this matter into discussion after such a length of time, when it is only through your own neglect that you did not do so within the time limited by the statute" (p).

Must be
proved.

The mere allegation of fraud, however, will not enable any one to open transactions many years after having notice of it. That doctrine might itself be the means of perpetrating the greatest frauds, in cases where the evidence being lost by the lapse of time an innocent person might be left defenceless. The fraud must be proved (q).

Will not be
assumed on
doubtful evi-
dence.

In proportion, however, as the jurisdiction of equity is powerful and operative, so ought the care and caution of the court to be anxiously exercised as to the grounds upon which it proceeds, lest in the zeal to do equity the reverse be effected. When much time has elapsed since the transactions complained of, there having been parties who were competent to have complained, the court will not, upon doubtful or ambiguous evidence, assume a case of fraud (r).

Must be actual
as well as
concealed.

The nature of the fraud to which this provision applies is concealed fraud, and it must also be actual fraud, and not, as we shall presently show, constructive merely,

(o) *Marquis of Clanricarde v. Henning*, 30 Beav. 175.

(p) 2 Sch. & Lef. 633, 4.

(q) *Browne v. Cross*, 14 Beav. 118; *Langley v. Fisher*, 9 Ib. 90; *Glascott v. Long*, 2 Phill. 310; *Beaden v. King*, 9 Hare, 499;

Curson v. Belworthy, 3 H. L. C. 742; *Smyth v. Smyth*, 2 Mad. 75; *Underwood v. Lord Courtown*, 2 Sch. & L. 41.

(r) *Bowen v. Evans*, 2 H. L. C. 257; *Beaden v. King*, 9 Hare, 499.

and the concealment may be either intentional, or actual where there may be an obligation not to conceal, even if disclosure be not required (*s*).

A concealed fraud within this provision does not mean the case of a party entering wrongfully into possession, but means a case of designed fraud by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables him to enter and hold (*t*). What are concealed frauds.

If on a compromise of an action brought for the recovery of land or a rent, a contract be made between the plaintiff and the defendant to pay to the plaintiff a certain sum and to his attorney his costs; but anterior to coming into court the defendant, well knowing the weakness of his case, arranges with the attorney to pay him a sum of money as a bribe, and if such a secret transaction be recently, for the first time, discovered, that would clearly be a concealed fraud (*u*).

So if a person take from a lunatic a conveyance and keep and act upon it as his title deed, nobody knowing of that conveyance, the donee holding the property under that conveyance until the fraud is discovered, a concealment exists to which this section of the statute is pointed (*x*).

The fact of an insolvent debtor deliberately stating in his schedule that which is false, namely, that he had no reversion, is a concealed fraud by reason of which the assignee in insolvency is "deprived" of the property, because the right to it vested in him under the assignment, but he was deprived of the possession of it by reason of the assertion of the insolvent, that he had no property of that description (*y*).

(*s*) 2 Swanst. 62.

(*t*) Per Kindersley, V.-C., *Petre v. Petre*, 1 Drew. 393. See also *Langley v. Fisher*, 9 Beav. 90.

(*u*) See *Manby v. Bowicke*, 3

K. & J. 342.

(*x*) *Lewis v. Thomas*, 3 Hare, 26.

(*y*) *Sturgis v. Morse*, 24 Beav. 541, stated p. 509, post.

The concealment by a lessee from persons claiming under the lessor of the lease would not be a concealed fraud within this provision (c), for no person is under an obligation to disclose his title to another person.

It has been said, indeed, that withholding information which the person withholding is bound to communicate would not be a concealed fraud within this provision (d). This proposition, however, is to be taken in only a qualified sense. The withholding such information may, at least, form one, and that the most important, element in a case of positive fraud involving circumstances amounting in equity to a concealment of it (e).

Ability of
claimant to
discover the
fraud.

The question will commonly arise under what circumstances a claimant may have been able, with reasonable diligence, to discover his rights and the liabilities of the opposite party (f). The condition of the mind of the claimant, when short of actual lunacy or perhaps absolute imbecility, will not be considered as rendering him unfit for the exercise of such reasonable diligence contemplated by the section 26 as requisite for knowing or discovering the fraud (g).

The statute suspends the operation of its general enactments during the disability of lunacy, and a person under such a disability is protected during its existence; but a person or his predecessor in title, who was or is in such a weak or infirm state of mind that there was no possibility of his discovering a fraud committed upon him, will not be considered to be a person incapable of using that diligence, which all persons who can obtain advice can use; namely, such diligence as to enable him to sue for and to recover his rights. Possibly a case

(c) See *Archbold v. Souilly*, 9 H. L. C. 348.

(d) Per Lord Chelmsford, 9 H. L. C. 384.

(e) *Charter v. Trevelyan*, 11 Cl. & F. 714. See also *Manby v.*

Bewicke, 3 K. & J. 342, 367.

(f) See *Archbold v. Souilly*, 9 H. L. C. 348.

(g) *Manby v. Bewicke*, 3 Kay & J. 342.

may occur in which there may be such a degree of imbecility of mind, not amounting to lunacy, as to make it a question of considerable importance and difficulty for a court to determine (*h*).

In *Sturgis v. Morse* (*i*), the Master of the Rolls considered that under the circumstances of the assignee under the insolvency in 1831, there was nothing which put him upon the knowledge, or showed that, "with reasonable diligence," he might have ascertained the fraud which had been committed upon him; but that his successor in 1840 was put upon inquiry, which, if made, would have led to ascertaining the real facts, and in truth that he had notice at that time of the fraud, and from that time the right first accrued. His Honor also said, he treated the words "reason to believe" very much as he treated those in the former part of the section, "with reasonable diligence might," &c.

Protection, however, is given to a purchaser for value who has not assisted, *and*, when he purchased, did not know of, *and* had no reason to believe, in the commission of the fraud. The substitution here of *or* for *and* seems to be necessary. Assistance would involve knowledge, but there might be the latter without the former, and actual knowledge supersedes mere belief, but the latter may exist without the former.

If the dealings be such as fairly to lead a reasonable man to believe that fraud must have been used, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstain from inquiry because he sees that the result of inquiry will probably be to show that a transaction in

His obligation to inquire.

(*h*) *Manby v. Bewicke*, 3 Kay & J. 342.

(*i*) *Supra*.

Meaning of
sect. 26 ;

which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse (*k*).

The meaning of this provision, as regards purchasers for value, is, that in addition to being such, they must have neither assisted in, nor known of (*l*), nor had reason to believe in, the commission of the fraud, and that, under the general provision (*m*), after the expiration of twenty years from the time when the fraud is, or with reasonable diligence may be first known or discovered, such a purchaser is not to be disturbed.

In *Sturgis v. Morse*, a person became insolvent in 1825, and made the usual conveyance of his estate to the provisional assignee, and stated in his schedule that which was false ; namely, that he had no reversion. The reversion of the property in question came into possession in 1826. The insolvent mortgaged the property in 1829, and was declared bankrupt in 1831. Sir J. Romilly, M. R., held, the false statement in the schedule to be a concealed fraud, within the section 26 ; that the mortgagee had direct notice of it, and that, therefore, he was not entitled to priority over the assignee in insolvency. The legal estate, however, was in a trustee (*n*), so that the mortgage was only equitable, and *qui prior est tempore potior est jure*. On appeal to the lords justices they considered the case one of express trust between trustee and *cestui que trust*, and therefore not within the Statute of Limitations ; and decreed the assignee in bankruptcy, who had obtained a conveyance of the legal estate from the heir at law of the surviving trustee in whom the property had vested, and so become the express trustee, to account for the rents accordingly without allowance of payments made to the official assignee in the bankruptcy. Considering the case as one between trustee and *cestui que trust*,

(*k*) *Owen v. Stoman*, 4 H. L. Beav. 541.
C. 997. (*m*) Sect. 24.
(*l*) See *Sturgis v. Morse*, 24 (*n*) See 3 De G. & J. 1.

the possession of the assignee in bankruptcy, as such trustee, was the possession of the assignee in the insolvency, as the *cestui que trust*, and therefore not adverse (o).

The effect of the alteration made in the law by this —and its effect. provision, as the law stood at the time of the passing of this statute, is to impose upon a claimant of land or of rent, on the ground of concealed fraud, more vigilance in ascertaining, and more diligence in asserting, his claim.

Where the fraud is constructive only, or arises by construction of law upon acts not done *malo animo*, but tending to produce injury, the time runs from the period when the acts themselves were done (p); as in contracts between persons in fiduciary relations, as attorney and client (q), or trustee and *cestui que trust*, even under an express trust (r), not involving actual fraud.

In these cases length of time (of twenty years and upwards) is a bar, if the person to be barred has become within any reasonable period cognizant of the facts; for if there is the full period of twenty years, it is immaterial that during much of that time he had no notice of the fraud. It is a common mistake that the time begins to run from only the notice of the fraud. If the full twenty years are run, and the party has during a reasonable period within that time been cognizant of the facts constituting the fraud, always sup-

Accrues of right when fraud constructive only.

Effect of claimant's ignorance of facts during part of the time.

(o) Vide Book II. Chap. V. See also *In re Butler's Estate*, 13 Ir. Eq. R., N. S. 451.

(p) 2 Sch. & Lef. 634; *Beckford v. Wade*, 17 Ves. 96; *Gregory v. Gregory*, Comp. 201; Jac. 631; *Whalley v. Whalley*, 3 Bli. 1; *Champion v. Rigby*, 1 Russ. & M. 539; 19 L. J., N. S., Ch. 211; *Portlock v. Gardner*, 1 Hare, 594; *Roberts v. Tunstall*, 4 Hare, 257; *Marquis of Clanricarde v. Henning*, 30 Beav. 175; *Byrne v.*

Freer, 2 Moll. 176; *Langley v. Fisher*, 9 Beav. 90; *Lord Arran v. Lord Tyranny*, 1 Ball & B. 170; 2 Ib. 129; *Blennerhassett v. Day*, Ib. 118; *Gresley v. Mousley*, 1 Giff. 450; 4 De G. & J. 78; 3 De G., F. & J. 72, S. C.

(q) *Gregory v. Gregory*, *Champion v. Rigby*, *Marquis of Clanricarde v. Henning*, *Gresley v. Mousley*, supra.

(r) *Roberts v. Tunstall*, supra, and cases cited.

posing no disability proved, that is, legal disability, and not want of means or poverty, he is barred. The court will give him no aid, will refuse to be active, even to the extent of compelling a discovery (*s*).

Bar in constructive fraud, how, and from what time.

In these cases of constructive fraud, the bar is not imposed by, but only by analogy to, the Statute of Limitations, and the period from which the time begins to run is when the person aggrieved knew of the fraud, and was able to institute a suit to set aside the transaction involving the fraud (*t*).

On concealed fraud as to property not within sect. 27,

In case of concealed fraud involving property other than land or charges thereon, or rent, courts of equity, although not bound by this provision, ought, in the exercise of a sound discretion, to adopt, and will adopt, as a guide, the rule given by this provision (*u*); but, where the time it has fixed has not elapsed, subject to the exercise of their jurisdiction and powers to refuse relief on the ground of acquiescence or otherwise, for any shorter period, in accordance with the provision to be presently noticed.

—the old doctrine in equity still applicable.

The cases of fraud contemplated by this provision are only those within the jurisdiction of equity, and involving land, including charges thereon (*v*) and rent. Other cases of the same nature, but involving property other than land and rent, remain subject to the old doctrine, under the general jurisdiction of the courts of equity (*w*). And that doctrine is that, unless the person defrauded, having full information of his injuries and rights, allows time to elapse without seeking relief, time is no bar, for otherwise justice would be defeated; not because the case was not a proper one for the interference of the court, but because the deception was con-

(*s*) *Byrne v. Freer*, 2 Moll. 176.

(*t*) See *Blair v. Bromley*, 5 Hare, 542, on app. 2 Phill. 354; *Marquis of Clanricarde v. Henning*, 30 Beav. 175.

(*u*) See *Brooksbank v. Smith*,

2 You. & C., Ex. C. 58; *Denys v. Shuckburgh*, 4 Ib. 58.

(*v*) *Supra*, pp. 350, 351.

(*w*) *Alfrey v. Alfrey*, 1 M. & G. 87; *Blair v. Bromley*, 5 Hare, 542; 2 Phill. 354; *Dean v. Thwaites*, 21 Beav. 621.

tinued by the author of the fraud so long as to enable him to reap the benefit of it (*x*), and the clearest title cannot be used by a person cognizant of any fraud affecting it (*y*).

Courts of law make no distinction between concealed or any other fraud, and in the former kind hold the time to run, not from the discovery of a concealed fraud, but, as in any other kind, from the time when the cause of action first accrues (*z*), and the section 26 would not be available for a claimant of land or of rent in a court of law.

No distinction at law as to accruer of right, on concealed or any other fraud.

An important provision, in relation to rights which are to be asserted in equity, is contained in the 3 & 4 Will. 4, c. 27. The section 27 of that statute is a proviso that nothing in the act contained is to be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief to claimants, on the ground of acquiescence or otherwise, whose right to bring a suit may *not* be barred by the statute.

Effect of sect. 27 of c. 27 saving the jurisdiction of courts of equity in certain cases.

This provision involves an ambiguity. The meaning may be either to preserve the jurisdiction in only those cases within the act, namely, those of express trust and concealed fraud involving land, including charges thereon, and rent, or merely to exclude any inference from the act to affect the jurisdiction in cases not within the act, namely, those of such trust and fraud not involving such subjects. The precise meaning of this provision has not hitherto come into question. In *Thompson v. Simpson* (*a*), the right was to land,

(*x*) *Moore v. Royal*, 12 Ves. 355; *Roche v. O'Brien*, 1 Ball & B. 338; *Blennerhassett v. Day*, 2 Ib. 104; *Aylward v. Kearney*, Ib. 463; *Copis v. Middleton*, 2 Mad. 410; *Trevelyan v. Charter*, 4 L. J., N. S., Ch. 209; *Charter v. Trevelyan*, 11 Cl. & F. 714.

(*y*) 1 Dow, 80; *Allfrey v.*

Allfrey, 1 M. & G. 87; *Rolfe v. Gregory*, 11 Jur., N. S. 98.

(*z*) *Short v. McCarthy*, 3 B. & Ald. 626; *Bartley v. Faulkner*, Ib. 288; *Imperial Gas Light and Coke Co. v. London Gas Light Co.*, 10 Ex. 89.

(*a*) 1 Dru. & War. 459.

and first accrued seventeen years prior to the filing of the bill, and therefore the claimants were within the period of limitation fixed by the statute; and the court, after alluding to this provision as not affecting the jurisdiction in cases of acquiescence, determined, as against a purchaser for value with notice, that the claimants had not acquiesced so far as to protect the purchaser. In *Archbold v. Scully* (*x*), also, the right was to land claimed by a landlord against his tenant, and therefore the 3 & 4 Will. 4, c. 27, was held not to affect the case, Lord Chelmsford, however, seems to have thought that the lapse of time which had occurred, being less than twenty years, amounted to simple laches or delay in asserting the right; but that, even if there had been acquiescence properly so called, although the period of limitation had not expired, relief might have been refused by this provision.

If, in a suit to recover land, including charges thereon, or rent, in equity, the period of limitation can, under this provision, be shortened, it would seem to follow that an action of ejectment might be restrained by injunction, on the ground of acquiescence or otherwise, under its original jurisdiction, and thus, in effect, shorten the period of limitation at law, whilst there it can neither be extended (*y*) nor diminished by an equitable construction of the statute (*z*); and if titles, unquestionable at law, could be disturbed in equity, the Statute of Limitations would be useless, and no man could be sure of the possession of his estate (*a*).

The legislature having prescribed a specific period of limitation in cases of express trust and concealed fraud involving land, including charges thereon and rent, and chiefly for the protection of purchasers for value, in the former case, whether with or without notice of

(*x*) 9 H. L. C. 360.

(*y*) Plowd. 371.

(*z*) *Ib.*

(*a*) 2 Sch. & L. 71.

a breach of trust, but in the latter case, when neither assisting in, nor having notice, either actual or constructive, of the fraud, would seem to have intended merely to declare, *ex abundanti cautela*, that the act should not be construed to affect the rules or the jurisdiction of equity in cases not involving land, or charges thereon, or rent, and thus to exclude all question in such cases, and can scarcely be supposed to have intended to give to courts of equity, indirectly by a mere saving clause, jurisdiction to shorten, in such cases, the prescribed period of limitation.

Courts of equity have always considered it of the greatest possible importance that parties should not sleep on their rights (*b*), and require persons to come there in reasonable time. The peace of mankind, and the security of property, require it. If the demand is made under circumstances of inconvenience to individuals, that would break in upon those principles which are established for the peace of all the families constituting the great family of the public. Courts of equity have said you must go to those courts that were not made for a righteous man, if there be such courts; you cannot have relief in a court of equity (*c*).

Courts of equity, as to long-neglected rights, are passive.

A suit to enforce an express contract to convey an estate, if nothing be done under it for a long time, although less, much less (*d*), than twenty years, and although the contract be under seal, and *à fortiori* a suit to enforce a right arising not by, but depending upon and collateral to, an express contract, as a right to contribution, after the lapse of a much less period than twenty years, will not be entertained (*e*).

(*b*) 14 Beav. 113.

(*c*) 9 Ir. Eq. R., N. S. 478.

(*d*) *Crofton v. Ormsby*, 2 Sch. & L. 583; *Heapy v. Hill*, 2 Sim. & S. 29; *Watson v. Reid*, 1 R. & M. 286; *Walker v. Jefferys*, 1

Hare, 341; *Southcomb v. The Bishop of Exeter*, 6 Hare, 341; *Donn v. Harvey*, 15 Sim. 49.

(*e*) See *Stons v. Yed*, Jac. 426, 486, 513.

So, where a transaction is impeachable on only an equity arising out of the transaction itself, and less than twenty years have elapsed since the transaction took place, courts of equity constantly refuse relief to the person seeking their aid to impeach the transaction (*f*).

Even with respect to claims by a *cestui que trust* against an express trustee, the general rule of equity, that encouragement is not to be given to stale demands, is applicable; and in taking an account for the purpose of charging the trustee with personal liability, where the claim sought to be enforced is one which arose many years ago, and one of the nature and particulars of which the beneficiary was, at the time when it arose, perfectly cognizant, every fair allowance ought to be made in favour of the trustee (*g*).

The ground of those courts being so.

In these and analogous cases, courts of equity, however, in refusing relief upon stale demands, do not act either upon a presumption of actual payment or satisfaction (*h*), or on the ground of individual hardship or loss, or upon a bar by analogy to the Statute of Limitation (*i*), but upon public policy, upon the acknowledged principles of a court of equity, which, as Lord Camden said, in *Smith v. Clay* (*k*), "by its own proper authority always maintained a limitation, which prevented its being called into activity, unless at the requisition of conscience, good faith and reasonable diligence" (*l*).

In case of laches, as

Mere laches, negligence (*m*) or delay, and acquiescence, however, are distinguishable. Merely abstain-

(*f*) See *Oliver v. Court*, 8 Pri. 127; *Champion v. Rigby*, 1 Russ. & M. 539; *Gregory v. Gregory*, G. Coop. 201; *Atkins v. Delu*, 12 Ir. Eq. R. 1; *Roberts v. Tunstall*, 4 Hare, 257; *Smyth v. Smyth*, 2 Mad. 75.

(*g*) 11 H. L. C. 579.

(*h*) *Peyton v. M'Dermott*, 1 Dru. & Wal. 198.

(*i*) *Chalmers v. Bradley*, 1 J. & W. 51.

(*k*) 3 B. C. C. 639, n.; Ambl. 645.

(*l*) See *Pomfret v. Windsor*, 2 Ves. sen. 472; *Merry v. Ryces*, 1 Eden, 1, 7; *Jones v. Tuberville*, 2 Ves. sen. 11, 13; 4 B. C. C. 115; *Peyton v. M'Dermott*, supra.

(*m*) *Termes de la Ley*, voc. Laches; Co. Litt. 380 b.

ing from asserting by legal proceedings a right, is not acquiescence but mere passive assent, and cannot be regarded as anything more than laches or delay (*n*). Where one person invades the right of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations (*o*). Simply neglecting to enforce a claim during the period the law permits delay without losing the right cannot be any equitable bar by acquiescence; and where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute (*p*).

distinguished
from acquies-
cence;

In effect, the laches by a person out of possession, and the laches by a person in possession, under whatever title, differ (*q*).

Laches by a person in possession under an equitable title, in not clothing that title with the legal title, is not that species of laches which will prevail against the equitable title (*r*).

Delay by children claiming the execution of marriage articles for seventeen years, and aware of their rights, but whose father had possession of the articles, and until very recently before the commencement of the suit was abroad with his regiment, was held, as against a purchaser for value with notice, not acquiescence (*s*).

Mere laches, however, for a long period, short of the period of limitation, although insufficient to exclude the claimant from relief, may yet be ground for depriving him of costs (*t*).

(*n*) 9 H. L. C. 388; 3 De G., F. & J. 74; *Thompson v. Simpson*, 1 Dru. & War. 459.

(*o*) Per Lord Cranworth, V.-C., *The Rochdale Canal Co. v. King*, 2 Sim., N. S. 89.

(*p*) See *Murray v. Palmer*, 2

Sch. & L. 474; *Archbold v. Scully*, 9 H. L. C. 348.

(*q*) 5 Bl. N. R. 665.

(*r*) 2 Sch. & L. 603.

(*s*) *Thompson v. Simpson*, 1 Dru. & War. 459.

(*t*) *Archbold v. Scully*, 9 H. L. C. 348.

In the case of landlord and tenant, as respects all accruing payments of rent, the legal principle is, that the right is constantly renewed. Arrears may be lost; but there can be no neglect in not enforcing what is not due, and therefore in such cases the doctrine of laches is inapplicable (*u*).

—and of acquiescence as distinguished from laches.

Acquiescence, properly so called, is a different thing to, and means more than laches. If a person having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is properly acquiescence (*x*). The person so acquiescing for a long period, during which the position of the other person has been substantially altered, would be in a position in which for him to enforce his right would be unconscientious, and interference on his behalf would be refused (*y*).

Acquiescence also imports knowledge, or the means of knowledge, of the material facts alleged to have been acquiesced in (*z*); for a person cannot be said to have acquiesced in what he did not know (*a*), and as to claims which he did not know he could dispute (*b*).

Length of time, where it does not operate as a statutory or positive bar, operates simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not distinct propositions, but constitute one proposition (*c*).

(*u*) *Archbold v. Scully*, 9 H. L. C. 360.

(*x*) *Duke of Leeds v. Earl Amherst*, 2 Phill. 117; *Archbold v. Scully*, 9 H. L. C. 348. See also *Hardcastle v. Shafto*, 1 Anstr. 185; *East India Company v. Vincent*, 2 Atk. 83; 2 Mer. 362; *Hicks v. Cooke*, 4 Dow. 17; *Selsey v. Rhoades*, 1 Bli. N. R. 1; 2 Sim., N. S. 89.

(*y*) *Archbold v. Scully*, 9 H. L. C. 348.

(*z*) *Randall v. Errington*, 10 Ves. 427, 428; *Murray v. Palmer*,

2 Sch. & L. 474; *More v. Royal*, 12 Ib. 335; 2 Ball & B. 137; *March v. Russell*, 2 Myl. & C. 31; *Ryder v. Bickerton*, 3 Swanst. 81; *Bennett v. Colley*, 2 Myl. & K. 225; *Wall v. Cockerell*, 10 H. L. C. 229.

(*a*) 2 Mer. 362; 3 De Gex, F. & J. 74.

(*b*) 9 Hare, 16; *Marquis of Clanricarde v. Henning*, 30 Beauv. 175.

(*c*) Per Turner, L. J., 3 De G., F. & J. 72.

Although acquiescence without original concurrence for a long period will operate a bar to a claim; yet that is only a general rule, and the court must inquire into the circumstances which induced the acquiescence (*d*).

In equity, when the case is not within any Statute of Limitation, the cause of action or suit arises when and as soon as the party has a right to apply to a court of equity for relief (*e*). Mere lapse of time is nothing, until ascertained, by reference to the situation and circumstances of the parties, when it began to run against the title of the claimant (*f*).

If a tenant for life unimpeachable for waste commit equitable waste, his assets are liable to the remainderman for and to the extent of the profits derived from the waste so committed (*g*), and the right of the remainderman first accrues, not at the expiration of twenty years from the time the waste was committed, but as in a case of forfeiture at law by the tenant for life, at the expiration of that period from the death of the tenant for life (*h*).

In the case of a claim for compensation under a case of election, the right first accrues at the time when the election is made (*i*). Compensation on election.

Cases of mistake, even when in relation to land, or charges thereon, or rent, are not within the 3 & 4 Will. 4, c. 27, and are not so strong for the interference of a court of equity as cases of fraud (*j*). In cases of mistake, the former Statute of Limitations (*k*), although in terms absolutely binding on courts of law, that is, by the time of limitation next after the cause of action or suit, does not absolutely bind courts of equity, but they In cases of mistake.

(*d*) 3 Swanst. 64.

(*e*) *Whalley v. Whalley*, 3 Bli. 1; *Hiches v. Cooke*, 4 Dow, 17; *Greenlaw v. King*, 3 Beav. 49; *supra*, p. 510.

(*f*) 2 Phill. 124.

(*g*) *Marquis of Ormonde v.*

Kynnersley, 5 Mad. 369.

(*h*) *Duke of Leeds v. Earl Amherst*, 2 Phill. 117.

(*i*) See *Spread v. Morgan and others*, 11 H. L. C. 588, 617.

(*j*) 9 Hare, 176.

(*k*) 21 Jac. 1, c. 16.

adopt it as a rule to assist their discretion, and as in cases of fraud (*l*), so in cases of mistake of fact, hold the time to run from the discovery, because the laches of the plaintiff commences from that date on his acquaintance with all the circumstances (*m*).

So in cases of mistake of fact involving land, or charges thereon, or rent, courts of equity, although not bound by the section 26 of the 3 & 4 Will. 4, c. 27, ought, in the exercise of a sound discretion, to adopt, as their guide, that provision (*n*).

On redemption
of mortgages.

The twenty years within which mortgages of land and of rent are to be redeemed is regulated by the section 28, which, as before observed, taken in connection with the section 24, throws some light upon the intention of the Act, applies to legal mortgages as well as to equitable ones (*o*), relates exclusively to the rights of mortgagees (*p*), excludes the effect of their keeping accounts or otherwise treating themselves in that character (*q*), and is independent of the section 15, which has reference to only the lands affected by the provisions of the preceding sections (*r*).

This period of limitation is reckoned, either from the time next after the mortgagee obtains the possession or the receipt of the profits of the land, or the receipt of the rent, or from the time of the last acknowledgment in writing, if any, of the title of the mortgagor or of his right of redemption given to him, or to one of several mortgagors, or an agent, by the mortgagee or the person claiming through him, or by one or more of several mortgagees or the person claiming through

(*l*) *Supra*, p. 501 *et seq.*

(*m*) *Brooksbank v. Smith*, 2 Y. & C., Ex. C. 58.

(*n*) *Denys v. Shuckburgh*, 4 Y. & C., Ex. C. 58.

(*o*) See *Browne v. The Bishop of Cork*, 1 Dru. & Wal. 700; *Hyde*

v. Dallaway, 2 Hare, 528; 4 Beav. 606.

(*p*) 1 Dru. & Wal. 716.

(*q*) See *Baker v. Wetton*, 14 Sim. 426.

(*r*) 1 Dru. & Wal. 716.

him or them, but affecting only the person or persons giving the acknowledgment.

In ascertaining when the possession within the meaning of this provision commenced, the circumstances under which such possession was taken, and the nature of it, are to be kept in view.

With reference to the nature of the mortgagee's possession.

When the possession is taken by the mortgagee in that character alone under a mortgage made by an owner in fee, who afterwards settles the land or the rent, subject to the mortgage, that is, the equity of redemption for life, with remainders over, the possession taken during the existence of the life interest will exclude the title of the persons claiming in remainder (*s*), as well as that of the tenant for life.

But where the possession is taken by the mortgagee, not under the mortgage and in the character of mortgagee, but under a conveyance to him by the tenant for life of the equity of redemption, and upon the execution of such conveyance, such possession will not exclude the title of the remainderman (*t*).

So where the possession is taken by the mortgagee in that character under a mortgage made by a tenant for life and a remainderman, and is continued for less than twenty years, and during such possession the mortgagee purchases the interest of the tenant for life, and continues the possession altogether for twenty years and upwards, such possession will not exclude the title of the remainderman (*u*).

In *Hyde v. Dallaway*, the determination of the life estate was not shown, and the question arose between the devisees of the mortgagee, as vendors, and a purchaser, and a bill for specific performance was dismissed.

(*s*) See *Harrison v. Hollins*, 1 Sim. & S. 471; *Foster v. Blake*, 4 Bli. 140.

(*t*) *Corbett v. Barker*, 1 Anstr. 188; 3 Ib. 755; *Reeve v. Hicks*,

2 Sim. & S. 408, as to the copyholds only; *Raffety v. King*, 1 Keen, 601.

(*u*) *Hyde v. Dallaway*, 2 Hare, 528.

The case came again before the court on a resale, but the question was excluded by the contract (*x*).

If the possession be continued after the death of the tenant for life for a further period, which, together with that in his lifetime, will amount to twenty years, the title of those in remainder in the equity of redemption will be excluded (*y*).

But where the original dealing is clearly for the purchase of the life interest, and the assignment of the mortgage is taken merely as a security to protect the purchaser, the title of those entitled to the equity of redemption in remainder will, after the expiration of the prescribed period of limitation, be excluded (*z*). This would seem to be the *ratio decidendi* in *Ashton v. Milne* (*a*). The possession there seems to have been referred to the mortgage title, and not to the title under the imperfect conveyance of the equity of redemption.

In *Ashton v. Milne*, a conveyance was made in 1784, to a purchaser by two husbands and their wives, seised in right of the latter, but without any fine. A mortgage was paid off out of the purchase-money, and the mortgage term was assigned to a trustee for the purchaser, who on the execution of the conveyance took possession, and never afterwards during such possession, which continued for nearly half a century, recognized the right to redeem. In 1831, the heirs of the wives instituted a suit for redemption, and for preventing the setting up of the mortgage term, and the bill was dismissed with costs.

In *Browne v. The Bishop of Cork*, a contract was entered into for the sale of not merely the life interest of the tenant for life, but of the interest of those persons in remainder in the equity of redemption, and the purchaser took, for the protection of his title, a transfer

(*x*) 4 Beav. 606.

(*y*) *Pim v. Goodwin*, 4 Bli. 1 Keen, 612.

(*z*) *Browne v. The Bishop of*

Cork, 1 Dru. & Wal. 700.

(*a*) 6 Sim. 369. On this case see 1 Keen, 615.

to a trustee for himself of an old mortgage of the legal estate, and entered into and continued the possession for more than twenty years, and the title of the persons claiming under the purchaser was held to be absolute under this section 28, against persons claiming the equity of redemption (*b*).

In the case of what is called a Welsh mortgage, that is, where land is conveyed subject to a condition for redemption at any future time upon payment of the principal only, the rents and profits being received in the meantime in lieu of interest, sometimes called a purchase, with a right of repurchase reserved, the period of limitation will not commence against the mortgagee so long as he is in such receipt, nor against the mortgagor until the principal has been satisfied (*c*).

On Welsh mortgages.

The period of limitation for advowsons is the same both at law and in equity, and is computed from, and the right to the advowson first accrues, independent of the nature of the estate or interest, whether present or future, and of the capacity of the claimant to assert the right, at the time when the possession of the advowson commences adversely to the rightful owner (*d*), although such owner be a corporation either aggregate or sole, and the time has commenced against a predecessor (*e*).

For advowsons.

Such possession of a benefice presentative is acquired and will be complete, for some purposes, when it is full, that is, on the admission and institution of the clerk presented (*f*), and, if the advowson belong to a Protestant and a Roman Catholic in common in fee, on the admission and institution of the clerk presented by the former alone (*g*). For the purposes of this statute,

When possession of benefices presentative,

(*b*) *Brown v. The Bishop of Cork*, 1 Dru. & Wal. 700.

(*c*) See *Yates v. Hambly*, 2 Atk. 368; *Longuet v. Seamen*, 1 Ves. 408; *Fenwick v. Reed*, 1 Mer. 125.

(*d*) Sect. 30.

(*e*) Vide supra, pp. 419, 420.

(*f*) 6 Rep. 49; Co. Litt. 119 b, 344 a, b.

(*g*) *Edwards v. The Bishop of Exeter*, 5 Bing. N. C. 652.

however, induction also would seem to be necessary (*h*).

Admission refers to the ability of a clerk, but sometimes includes institution also (*i*), and, strictly speaking, relates to the admission of a clerk on the presentation of another, and not to collation by a bishop, and is where a third person brings and presents his clerk to the bishop (*j*), who, if he approve him, "admits" him, thereby ratifying and approving the presentation of the patron (*k*). A curate is admitted only: a vicar is instituted also, and generally inducted. Admission is peculiarly applicable to a curate, and institution to a vicar (*l*).

—collative,

Where the benefice is collative, it will be full against the rightful owner when the right of collation is exercised, or a presentation to the benefice is made, by another person (*m*).

The benefice, however, is not full where the presentation is on a simoniacal contract (*n*), nor on a collation thereto without title (*o*), for collation is an ambiguous act (*p*); or when made in time of war, although the institution and induction, which are but as executions of the presentment, be in time of peace (*q*).

—and on next presentation only, is complete.

In the case of a next presentation only to or in a benefice presentative, the possession will be complete at the same time, and the six months will be computed from thence to the teste of the writ of *quare impedit* (*r*); and when the benefice is collative, at and from the collation.

For benefices

The sixty years within which a patron professing the

(*h*) Vide supra, p. 421.
 (*i*) Co. Litt. 344 a; 6 Rep. 50 a.
 (*j*) Co. Litt. 120 a.
 (*k*) Per Cur., *London v. Derry*,
 1 Smythe's Ir. Rep. 518.
 (*l*) Per Lord Tenterden, *Cooke*
v. Elphin, 5 Bli., N. S. 128. See
 also *London v. Derry*, 1 Smythe's
 Ir. Rep. 517.

(*m*) 6 Co. 30 a; Co. Litt. 344 b.
 (*n*) Co. Litt. 120 a; *Winch-*
comb v. The Bishop of Winton,
 Hob. 165.
 (*o*) Co. Litt. 344 b.
 (*p*) Vide supra, pp. 421, 422.
 (*q*) 1 Rep. 99 b; 2 Ib. 93; 6 Ib.
 30 a; Co. Litt. 249 a, b.
 (*r*) Co. Litt. 344 b.

Roman Catholic religion may, by conforming to the United Church of England and Ireland, recover an advowson to which, under the 18 Car. 2 (I.) or the 2 Anne, c. 6 (E.), he cannot present during his nonconformity, is to be computed from the day on which he so conformed (*s*).

of papist
patrons.

The several periods of time for rights of common or other *profits à pendre*, for ways or other easements, watercourses or the use of water, to be enjoyed or derived upon, over or from any land or water, and for the access and use of light to and for any building, fixed by the 2 & 3 Will. 4, c. 71, are next before some suit or action wherein the claim or matter to which those periods relate has been or is in question (*t*).

For profits and
other rights
under 2 & 3
Will. 4, c. 71.

These periods are to be reckoned from the date of the commencement of the right claimed until the commencement of the suit (*u*), or possibly some other suit (*v*) and user beyond the period may be shown (*w*).

The right must be proved for the full period of time prescribed, and as of right (*x*), and without interruption (*y*), and continuously (*z*), and that there was not an interruption for one year before the commencement of the suit (*a*).

The first period of limitation of sixty years for prescriptions and claims of, or for, any *modus decimandi*, or of, or to, any exemption from, or discharge of, tithes, under the 2 & 3 Will. 4, c. 100 (E.), and the 1 & 2

For claims
under 2 & 3
Will. 4, c. 100.

(*s*) 7 Vict. c. 54, s. 4.

(*t*) Sect. 4; *Welcome v. Up-
ton*, 6 M. & W. 586; *Flight v.
Thomas*, 3 Per. & D. 442; 8 Cl.
& F. 281; *Bright v. Walker*, 4
Tyrw. 502; *Onley v. Gardiner*, 4
M. & W. 76; *Richards v. Fry*, 7
Ad. & E. 698; *Jones v. Price*, 3
Bing. N. C. 52; *Davies v. Wil-
liams*, 20 L. J., Q. B. 380; *Eaton
v. Swansea Works Company*, 1b.
482; *Arkwright v. Gell*, 5 M. &
W. 208.

(*) *Wright v. Williams*, 1 M.

& W. 72; *Lawson v. Langley*, 4
Ad. & E. 890; *Flight v. Thomas*,
supra.

(*v*) 7 Ad. & E. 707.

(*w*) *Lawson v. Langley*.

(*x*) 4 Tyrw. 508; *Bennison v.
Cartwright*, 5 B. & S. 1; *Ennor
v. Barwell*, 2 Giff. 410.

(*y*) 4 Tyrw. 509.

(*z*) *Onley v. Gardiner*, 4 M.
& W. 496; *Ennor v. Barwell*, 2
Giff. 410.

(*a*) *Ennor v. Barwell*.

Vict. c. 109 (I.), is next before the demand of tithes in kind.

The second period of limitation for the same matters, sixty-three years, is, as to sixty years, from the commencement of the first of two incumbencies, of that duration, or, together with such a number of years as will amount to that term, next before the demand of the render of tithes in kind, and, as to the three years, from the commencement of a third incumbency.

For gross sums
charged on
land or rent,
by

The twenty years for money secured by mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, are next after a present right to receive the money or the legacy has accrued to some person capable of giving a discharge for or release of the same (b).

— mortgage,

The right to receive and to recover as against the land or rent (c) money secured by mortgage may accrue and be barred (d), whilst the right to recover the land or the rent itself comprised in the mortgage may not have accrued (e).

The last case was decided on the doctrine of non-adverse possession (f), a circumstance which seems to have been overlooked in *Dearman v. Wyche*. The question in *Doe v. Williams* was what, as between the mortgagor and the mortgagee, was the nature of the possession by the former, and the possession was determined not to have been adverse to the latter, and that he was, by the section 15, not barred until five years after the passing of the 3 & 4 Will. 4, c. 27.

Although a mortgagee who has lost his right at law will not be assisted in equity in recovering either the land or the money (g), yet his right to the former

(b) 3 & 4 Will. 4, c. 27, s. 40.

(c) *Forsyth v. Bristow*, 8 Ex. 716.

(d) *Dearman v. Wyche*, 2 Sim. 570.

(e) *Doe d. Jones v. Williams*, 5 Ad. & E. 291.

(f) 2 Con. & L. 150. On that case see also 1 Ib. 514; 2 Hare, 382.

(g) *Dearman v. Wyche*, supra.

may accrue before his right to the mortgage money, and, consequently, the former right may be barred whilst the latter remains. Thus, where the mortgagor is not entitled to the possession of the land, from the time of the making of the mortgage until default is made in payment of the mortgage money, the right of the mortgagee to the land first accrues on the execution of the mortgage (*h*), and would be barred within twenty years from that time; but his right to the mortgage money would first accrue at the time appointed for the payment, and that time is usually at the end of six months, and sometimes of a longer period, from the date of the mortgage.

The converse of this case also holds, and the right of the mortgagee to recover the debt at law may be lost, and his right to the property in mortgage may be unaffected, as where the property is reversionary, and does not fall into possession until after the right to the money is lost (*i*).

Mortgagees who give to subsequent ones priority have not, whilst the income is insufficient to pay the interest of the subsequent mortgages, any present right to receive their mortgage money within the meaning of the statute (*k*),

A judgment revived on a *sci. fa.* as against fresh parties confers a new right of action (*l*). So, also, where there is no change of parties (*m*). But this has been doubted (*n*). Such a judgment may be sued upon after the lapse of more than twenty years after the obtaining of the original judgment, and is not an ex-

(*h*) *Doe d. Roylance v. Lightfoot*, 8 M. & W. 559. See also *Doe d. Jones v. Williams*, 5 Ad. & E. 291; *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*i*) *Seager v. Aston*, 3 Jur., N. S. 484.

(*k*) *Jortin v. South Eastern Railway Company*, 6 De G., M. & G. 270.

(*l*) *Farran v. Beresford*, 10 Cl. & F. 819; *Furrell v. Gleeson*, 11 Ib. 702.

(*m*) *Re Blake*, 2 Ir. Ch. Rep. 648; *Murray v. Clarke*, 4 Ir. C. L. Rep. 610; *Ottimell v. Farran*, 1 Sansse & S. 218, n.

(*n*) See *Furran v. Beresford*, sup.

ception within the sect. 40 of the 3 & 4 Will. 4, c. 27; and the right to receive the amount of such a judgment accrues, not on the date of the original judgment, but on the last revival, or award of execution (*o*); and the judgment affects those lands the conusor of the original judgment had when the latter was obtained, although he alienated them before the revivor (*p*).

—lien.

In the case of a lien of a vendor upon land for the unpaid purchase-money for it, the time when the right to receive such money accrues depends upon the time when the title is shown upon the original contract. The money does not become payable necessarily at the time fixed for completion of the purchase. The right would accrue upon the title being perfected by evidence. The right to the purchase-money does not accrue till the time arrives for completion, and the right to receive interest accrues at the same time. If no title be made, there is no right to principal or interest (*q*).

Legacies.

The present right to receive a legacy charged on a reversion accrues on the death of the tenant for life, or otherwise on the reversion coming into possession (*r*). Not charged on land, and payable on the death of a third person, such right accrues on the death of such person (*s*).

A present right to receive a legacy charged upon land is not prevented or postponed by the existence of prior charges upon the land charged with the legacy (*t*).

When person
to and against
whom right

This clause of the statute assumes the co-existence, when the right first accrues, of a person capable of giving a discharge or release, and also of another dis-

(*o*) *Kealey v. Bodkin*, 1 Saussé & S. 211.

(*p*) *Murray v. Clarke*, *supra*.

(*q*) See *Tuft v. Stephenson*, 7 Hare, 1; 1 De G., M. & G. 28; 5 Ib. 785.

(*r*) *Earle v. Bellingham*, 24

Beav. 448; 27 L. J., N. S., Ch. 545.

(*s*) *Prior v. Horniblow*, 2 You. & C. 260; *Seager v. Aston*, 3 Jur., N. S. 481.

(*t*) *Proud v. Proud*, 32 Beav. 234.

inct and assignable person by whom the money is presently payable, or who is capable of paying it, or of making an acknowledgment of the right thereto; and unless there are such co-existing persons the statute is inapplicable. Where, therefore, a tenant for life of settled estates subject to a charge pays it off, but takes no steps expressive of his intention to keep it on foot, the charge is not within the purview of the statute, but remains an existing charge in favour of his representatives, although more than twenty years have elapsed since the payment of it by him (*u*); for where the same person is to pay and also to receive, the statute does not run, and a court of equity considers that the payment of interest has actually taken place (*x*).

accrues is one and the same.

It has been already shown when the right of an executor or an administrator in the case of chattels real in corporeal hereditaments, including tithes, first accrues, in general, independent of and in connexion with the section 6, but more particularly in the case of administrators, to whom that section is expressly directed (*y*).

Executors and administrators.

Although this section 6 is, in terms, for the purposes of the act generally, yet other provisions of the statute show that the section does not apply to all the subjects for which the statute has fixed a period of limitation. Thus, the period fixed by the section now under consideration (sect. 40), within which the subjects mentioned in it are to be recovered, is next after a present right to receive the same has accrued to some person capable of giving a discharge or release for the same, words which necessarily imply the existence of a person at the time when the right accrues; and therefore, as re-

Accrues of right in certain cases not affected by section 6 of 3 & 4 Will. 4, c. 27.

(*u*) *Burrell v. Earl Egremont*, 7 Beav. 287; *M'Carthy v. Daunt*, 11 Ir. Eq. Rep. 29; *Kirkwood v. Lloyd*, lb. 561; 12 Ib. 585.

(*x*) *O'Fallon v. Dillon*, 2 Sch.

& Lef. 20; *Burrowes v. Gore*, 6 H. L. C. 907; *Burrell v. Earl Egremont*, supra.

(*y*) Vide ante, p. 464—470.

spects these subjects, the rules of law applicable in those cases where the right has not accrued to a testator or an intestate, and there is no executor who has proved the will or has acted as such, or no administrator, when the right first accrues.

Notwithstanding the section 6, the time when the right accrues under the section 40 may be dependent upon the existence of such representatives. (1.) When the right accrues a representative may be in existence, but his capacity may be imperfect, as in the case of an executor who has neither acted as such, nor has proved the will of his testator. In such case the period of limitation fixed by this section 40 will be computed from the time when the will of the testator has been proved, or the executor has acted as such (z). (2.) When the right accrues no representative may exist, as where the person to or against whom the right would have accrued if such person had been *in esse* when it accrued, is dead intestate, and no letters of administration in respect of his effects have been obtained. In such case the period of limitation will be computed from the time when the letters of administration are obtained (a).

Accrues to
persons in
prison or
beyond seas.

When the person to whom the right accrues under the sect. 40 of 3 & 4 Will. 4, c. 27, is imprisoned, or is out of Great Britain and Ireland and the Channel Islands, when the right accrues he is not, on merely either of those grounds, to sue beyond the time fixed by that section (b).

On acknow-
ledgment.

If, however, after the right has first accrued, and before the expiration of the twenty years, any payment

(z) *Joliffe v. Pitt*, 2 Vern. 694; *Douglas v. Forrest*, 4 Bing. 686; *Storey v. Fry*, 1 Y. & C. C. C. 603.

(a) *Stamford's case*, cit. Cro. Jac. 61; *Cary v. Stephenson*, 2 Salk. 421; *Fairclain v. Little*, cit. 5 B. & Ald. 214; *Murray v. East India Co.*, 1b. 204; *Holland*

v. Clark, 1 You. & C. C. C. 151; *Sturgis v. Darell*, 4 Ex., N. S. 622; 6 Ib. 120; *Binns v. Nichols*, 2 Law R., Eq. Ca. 256, 35 L. J., N. S. Eq. 635, 14 W. R., 727, S. C.

(b) 19 & 20 Vict. c. 97, ss. 10, 11, 12.

of principal (c) or of interest has been made, or any acknowledgment of the right to the money in the manner shown in a subsequent chapter has been given, the twenty years are computed from such payment or such acknowledgment, or, if more than one, from the last of them (d).

The six years for arrears of dower are computed from next before the commencement of the action or suit, that is, the issuing of the writ or the filing of the bill (e). For arrears of dower,

The six years for damages for such arrears, as respects the land (f), are computed from the same period as that in respect to the arrears themselves, but as respects the personal liability to such damages from the cause of action or suit (g). —and damages for them.

The six years for arrears of rent, and of interest in respect of any sum of money charged upon or payable out of any land or rent or in respect of any legacy, and for any damages in respect of such arrears, are next after the same respectively become due, or next after an acknowledgment of the same in writing is given to the person entitled thereto or his agent, signed by the person by whom the same is payable, or his agent (h). For arrears of rent and damages for them.

The words in this sect. 42, "the person by whom the same is payable, or his agent," refer to the same persons as the similar words used in the sect. 40 (i), and do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears may be enforced by any action or suit, and by whom, therefore, as they have a right to pay such interest on redemption of their land, interest may be properly said Interpretation of sects. 40 and 42 of c. 27.

(c) *Burrowes v. Gore*, 6 H. L. C. 907.

(d) 3 & 4 Will. 4, c. 27, s. 40.

(e) Sect. 41; *Bamford v. Bamford*, 5 Hare, 263.

(f) Vide ante, p. 400 *et seq*

(g) *Ib.*

(h) Sect. 42, 3 & 4 Will. 4, c. 27.

(i) *Supra*; *Chinnery v. Evans*, 11 H. L. C. 115.

to be payable (*k*), but are words of such large import and meaning that they would not only comprehend a mortgagor and his personal representatives, upon whom the contract would be personally binding, but would also include a second or a third mortgagee, by whom the principal and interest due to a first mortgagee might, with propriety, be said to be payable, inasmuch as the estate and right of the second mortgagee is subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgagee upon the payment of the principal and interest (*l*).

Object and effect of acknowledgment under sect. 42.

The object and effect of a payment or a written acknowledgment, under the section 42, differ from the object and effect of the same acts under the section 40, just noticed. The object and effect of those acts under the section 42 are to give to a mortgagor or other person, who is "by law compellable to pay the interest," a statutory power to deprive, by his acknowledgment given to a prior incumbrancer, the subsequent incumbrancers of the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule, that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands, without an acknowledgment in writing signed by such person, or by some former owner from whom the interest is derived.

As between first and second mortgagees.

Where, therefore, there are several incumbrances upon the same land, ranking in a series one after the other, payment made, or a written acknowledgment given, by the mortgagor, will not keep alive the right of the first mortgagee to arrears of interest as against the second mortgagee (*m*).

Where interest

Where interest is presently payable, and there is

(*k*) *Bolding v. Lane*, 1 De G., J. & S. 122.

(*l*) 11 H. L. C. 135.

(*m*) *Bolding v. Lane*, 1 De G., J. & S. 122; 11 H. L. C. 134.

nothing to stop it, the time commences immediately (*n*). But where the principal money is not due, interest cannot become due until the principal becomes payable. Therefore, in the case of a contract for the sale and purchase of land, the right to the purchase-money depends upon the time when the title was shown by the original contract, and does not become payable at the time appointed by the contract, but upon the title being perfected by evidence; and the right to receive interest accrues at the same time. Interest is not payable until it be seen whether the contract can be completed, and the vendor can have no lien except upon the terms of completing the original contract. It is upon completion that interest becomes due, although to be calculated from the inception of the contract (*o*). is and is not presently payable.

Where a claim by petition in a suit is made for arrears of an annuity charged on land, as the annuitant cannot be considered in possession until he asserts his title, the six years are to be computed from the time when the claim is made in the suit (*p*). Arrears of annuity claimed in a suit.

In the case of judgments claimed in a suit for specific performance the six years are computed, not from the filing of the bill, but from the time of filing the charges on the foot of the judgments in the master's office (*q*). Interest on judgments.

When the person to whom the right accrues under the sections 41 and 42, just noticed, is out of Great Britain and the Channel Islands when the right accrues, he is not, on merely that ground, to sue beyond the times fixed by those sections (*r*). On absence of claimant beyond seas.

- (*n*) *Hodges v. Croydon Canal Co.*, 3 Beav. 86. & G. 640.
 (*q*) *Henry v. Smith*, 1 Con. & L. 506.
 (*o*) *Toft v. Stevenson*, 6 De G., M. & G. 785.
 (*p*) *Hunter v. Nockolds*, 1 M. 11, 12.
 (*r*) 19 & 20 Vict. c. 97, ss. 10, 11, 12.

CHAPTER V.

THE SHORTENING AND THE SUSPENSION OF THE PERIODS
OF LIMITATION.

SECTION I.

The Shortening of the Periods of Limitation.

General principle in fixing the time of limitation.

THE general principle of the Statutes of Limitation has been to fix the period during which a party having a right to institute legal proceedings may exercise that right, and to bar those only who, having an available right, omit, during that period, to exercise it (*a*). But for these statutes to operate a complete bar to either the right or the remedy, the full period prescribed by them must elapse (*b*); and for the benefit of the person with whom it commenced, or of some person claiming under, or in privity with, such person (*c*). And where the statutable time has run, there is no exception to it, whether the party knows of his right or not (*d*).

In some cases, indeed, the period may and does include time during which no available right exists (*e*). This, however, is no new principle, but is conformable to the law which prevailed from the time of Henry the Third till that of William the Fourth. The form, indeed, in which this intention is ex-

(*a*) 10 C. B. 38; 2 H. L. C. 831.

(*b*) *Goodtitle d. Parker v. Baldwin*, 11 East, 488; 17 Beav. 429.

(*c*) *Ib.* See also *Doe d. Carter v. Barnard*, 13 Q. B. 945; *Dixon v. Gayfere*, 17 Beav. 421; *Asher*

and *Us. v. Whitlock*, 1 Law Rep., Q. B. 1; *Groome v. Blake*, 6 Ir. C. L. R. 400; 8 Ib. 828, S. C.; *Clarke v. Clarke*, Ir. L. R., 2 Q. B. 395.

(*d*) 2 Phill. 124.

(*e*) See *De Beauvoir v. Owen*, 16 M. & W. 565.

pressed is somewhat strange and paradoxical, in directing a right of action to be deemed to have first accrued, when none has accrued at all; but the words of the 3 & 4 Will. 4, c. 27, are certainly capable of this sense; which is, indeed, the most obvious one; and a similar arbitrary use of language is not without example in recent legislation, and the substance and effect of the provision, in pointing out the time from which the limitation is to run, is nothing more than might be expected, looking at the law as it had long existed, and at the precedents of legislation on the subject (*f*).

But generally, as respects the times of limitation, the claimant cannot be aided by the equity of the statutes fixing those times, inasmuch as they are positive laws for the time, and, therefore, when they have particularly limited divers times to persons in divers degrees, to make an alteration in that time would be more contrariant than agreeable to the minds and intentions of the makers of the acts, and as they are special, and limit a certainty of time in every point, and are defective in no part as to time, the time limited shall not be altered or enlarged by equity (*g*); for if titles, unquestionable at law, could be disturbed in equity, these statutes would be useless, and no man would be sure of the possession of his estate (*h*); and unless the limit pointed out by them be observed, no man is safe, but may be reduced to poverty after long and undisputed possession (*i*). It has been said, however, that if, to avoid an inconvenience plainly and manifestly arising from a strict construction of the words of the statutes, the words be capable of being modified, the court ought to modify them (*k*). This is,

The time not altered by equitable construction.

(*f*) 16 Mee. & W. 565; 5 Ex. C. B., N. S. 393.
 281; 9 Q. B. 358. (*h*) 2 Sch. & Lef. 71.
 (*g*) Plowd. 374 a; 1 B. C. C. (*i*) 3 Brod. & Bing. 224.
 291; *Wright v. Williams*, 1 M. & (*k*) Per Lord Abinger, C. B., 1
 W. 77, 99; *Penny v. Brice*, 18 M. & W. 99.

at least, questionable, and not easy to reconcile with the broad principle just stated, that claimants cannot be aided by an equitable construction of these statutes.

Although a suit be commenced before the expiration of the time of limitation in order to avoid the effect of the statutes, yet, after that expiration, such suit cannot be discontinued and a new one commenced for the assertion of the same right (*l*).

Dicta in Devine v. Holloway on sect. 16 of 3 & 4 Will. 4, c. 27.

In *Devine v. Holloway* (*m*) are *dicta* which, if adopted, would have the effect, under certain circumstances, of diminishing the period of limitation fixed by the sect. 2 of 3 & 4 Will. 4, c. 27. There the first right accrued in 1830 to a person under the disability of absence beyond seas, and who, without asserting his right, died under such disability in 1835, leaving as his heir a grandson, also under the like disability, who, in 1856, returned and brought an action of ejectment. More than twenty years, however, calculated from either 1830 or 1835, having elapsed, his right was barred and extinguished. On appeal by him from this decision, the court said, alluding to sect. 16 of the same statute, that it did not assist the appellant, for the ten years which it gives him *from the death of his grandfather*, through whom he claims, "expired in 1845, long before the expiration of the twenty years to which he was entitled under sect. 2." . . . "It is plain that under that section the right of the appellant was barred at the end of ten years after the death of" the grandfather. If this were so, the consequence will be, that when the right first accrues to a person who is under disability, and the disability ceases the next day, he would have but ten years from the cesser; and if he died the next day under the disability, the person claiming through him would have but the same time. That is, each

(*l*) *Leigh v. Leigh*, 2 Bing. N. C. 250.
C. 464; *Fbot v. Collins*, 1 Myl. & (m) 14 Moore, P. C. C. 290.

person, by reason of the disability, would have only ten years instead of twenty years, and be in a worse position from these provisions as to disabilities than if those provisions had been entirely omitted. This, however, would seem to be utterly opposed both to the spirit and the intention of the legislature. These provisions were manifestly intended for the protection of persons under disability, by giving to them an extended period beyond that fixed by the section 2. But if this interpretation be adopted, such persons may be, in many cases, greatly prejudiced. The meaning of the statute would seem to be, that they, as well as other persons, shall have twenty years under the sect. 2, although during half or any less portion of that period disabilities may have existed, but also an additional allowance of time for disabilities, so as to give them at least, in every case, the full period of twenty years. They may have a longer period, but not in any case, on account of disability, longer than forty years. The language of this statute is, in substance, the same as the old Statute of Limitations (*n*); and the case of *Doe d. George v. Jesson* (*o*) upon that statute supports this view, although even there the full period of limitation had expired before the action was brought, and more than ten years after the disability had ceased. *Devine v. Holloway* was decided in 1861, but is not noticed by Lord St. Leonards in the last edition of his Treatise on the New Statutes relating to Real Property, published in 1862.

In *Hogan v. Hand* (*p*), the same court said the sect. 16, in the case of a person beyond the seas at the time when his title accrues, saves his right for ten years after the twenty years given by the 2nd section. The right first accrued to a person under disability, who

Hogan v. Hand as to same section.

(*n*) 21 Jac. 1, c. 16.

(*p*) 14 Moore, P. C. C. 318,

(*o*) 6 East, 85. See also *Cotterell v. Dutton*, 4 Taunt. 830.

327.

continued under it to the time of commencing his action. In *Devine v. Holloway* the right first accrued to a person under disability, who died under it at the end of five years afterwards, and the right descended to his heir, also under disability, who continued under it to the time of commencing his action.

SECTION II.

The Suspension of the Periods of Limitation.

Time having commenced is not, in general, suspended.

In general, when the period of limitation has once commenced, no suspension of it will take place as regards the claimant, not even by reason of any subsequent disability in him (*q*), or by the creation of successive life estates by an owner in fee (*r*).

So where the time has commenced, but before it expires, and before any action or suit has been commenced, the person to sue (*s*), or the person to be sued (*t*), dies, no suspension of the period of limitation by reason of there being no personal representative of either of such persons, will take place.

Notwithstanding the person against whom the claim arises being under disability, except perhaps that of absence beyond seas, the period of limitation will commence, and will not be suspended (*u*) by reason of such disability.

(*q*) *Stonel v. Lord Zouch*, Plowd. 353; *Doe v. Jones*, 4 T. R. 310; *Doe v. Jesson*, 6 East, 80; *Cotterell v. Dutton*, 4 Taunt. 826; *Tolson v. Kaye*, 3 Brod. & B. 217; *Rhodes v. Smethurst*, 4 M. & W. 42; 6 Ib. 351; *Freaker v. Cranefeldt*, 3 Myl. & C. 499; *Penny v. Brice*, 18 C. B., N. S. 393; *Goodall v. Skerratt*, 3 Drew. 216.

(*r*) See *Pool v. Griffith*, 15 Ir. L. R. 239, 270.

(*s*) *Hickman v. Walker*, Willes, 27; *Smith v. Hill*, 1 Wils. 134.

(*t*) *Rhodes v. Smethurst*, 4 M. & W. 42, affirmed on error, 6 Ib. 351.

(*u*) See *Jones v. Tuberville*, 2 Ves. Ir. 14; *Rock v. Cooke*, 1 De G. & S. 675; *Fladong v. Winter*, 19 Ves. 196; *Town v. Mead*, 16 C. B. 123.

Circumstances, however, sometimes arise which operate a suspension of the period of limitation. Thus, where the period of limitation has commenced, but before it has expired, no person against whom the claim can be enforced exists by reason of a suspension of the remedy (*x*) against, and as respects the person liable, a suspension of the period of limitation, co-extensive with the period of such suspension of the remedy, will take place in favour of the claimant (*y*).

But may be,
— by non-
existence of a
person against
whom claim
may be en-
forced;

In *Hyde v. Dallaway*, a mortgagee claiming under a mortgage made by a tenant for life and a remainderman entered into possession of the land in 1817 as mortgagee, and in 1823 purchased the life interest in the equity of redemption. The 3 & 4 Will. 4, c. 27, came into operation on the 1st of January, 1834. The mortgagee and his devisees continued the possession until 1839, and neither he nor they appear to have made at any time after the possession commenced any acknowledgment of any title in any of the mortgagors, and the existence or the non-existence of the tenant for life did not appear. The court, notwithstanding the period of limitation had commenced, held, in effect, that it would be suspended by the subsequent purchase of the life estate by the mortgagee.

The case *Hyde v. Dallaway*, like *Browne v. The Bishop of Cork* (*z*), turned upon the section 28 of the 3 & 4 Will. 4, c. 27, and is opposed to the latter case, which, under similar circumstances, was held to be concluded by that section. These cases, as to some of the facts common to both, were differently circumstanced. In the former case the mortgage was created by the tenant for life and the remainderman, and the possession was taken by the mortgagee under his mortgage title;

(*x*) *Nedham's case*, 8 Co. 135;
Wankford v. Wankford, 1 Salk.
299; *Holt's Rep.* 366, *S. C.*

(*y*) *Hyde v. Dallaway*, 2 Hare,
528; *Kirkwood v. Lloyd*, 12 Ir. E.

R. 585; *Steward v. Marg. Conyngham*, 1 Ir. C. R. 534; *Seagram v. Knight*, 2 L. R., C. A. 628; 15 W.
R. 1152, *S. C.*

(*z*) 1 Dru. & Wal. 700.

and in the latter case the mortgage was created by the person from whom the tenant for life and the remainderman claimed, and the possession was taken by the mortgagee, not in that character, but in his character of purchaser of the life estate in the equity of redemption, having taken for his protection, as such purchaser, contemporaneously with his purchase, an assignment of the mortgage, but that distinction was held to be immaterial since the statute. It may also be observed that in *Hyde v. Dallaway*, the question arose indirectly in a suit by the persons claiming through the mortgagee against a purchaser for the specific performance of a contract for the sale of the mortgaged property; whilst in *Browne v. The Bishop of Cork*, the question arose directly in a suit by persons claiming through the mortgagor for the redemption of the property against the persons claiming through the mortgagee. In *Hyde v. Dallaway*, also, the possession of the mortgagee commenced, and the fact which would produce the suspension, that is, the purchase of the life estate in the equity of redemption, occurred before, and that the possession continued after, the 3 & 4 Will. 4, c. 27 had passed. But the possession so commencing, and the purchase being so made were immaterial, for the statute is, and has been held to be (a), retrospective.

—by abatement of proceedings on death of the person liable;

So where proceedings are commenced within the prescribed period, but afterwards abate by the death of the person against whom they are commenced, and for want of a representative of the deceased until long after the expiration of that period the claimant is prevented from following up the proceedings, the operation of the statute is suspended until a personal representative has been fully constituted, and a reasonable time, a year at least, has elapsed (b). *Actus Dei nemini facit injuriam*.

(a) *Browne v. The Bishop of Cork*, 1 Dru. & Wal. 700; *Bachelor v. Middleton*, 6 Hare, 75.
(b) *Curlewis v. Earl of Mor-*

For it would be a great hardship and unreasonable-ness in holding that time runs against a person who can do nothing to prevent it, and saying, that, though there is no person in existence whom he can sue, yet because the statute has run for a day or a month, during which there was a person whom he sued, it still continues to run.

The period of limitation having commenced may be entirely suspended by the act, or the omission of the person liable; as by a devise of a real estate (*c*) for the payment of debts, either primarily or in aid of the personal estate. For such a devise is an acknowledgment of such of the debts as, at the death of the testator, are not barred by the Statute of Limitations, and, as respects them, suspends, from his death, the time of limitation (*d*), but will not revive—a word implying that they were previously gone—those actually barred at his death (*e*); and the relation of trustee and *cestui que trust*, between the devisee in trust and the creditor, is created, and consequently the Statute of Limitation ceases to have any effect (*f*). —by the act, or omission, of the person liable;

A bequest of personal estate, however, for the payment of debts will not operate such suspension (*g*).

Again, where a mortgagee in possession becomes the purchaser of the life interest in the equity of redemption, a suspension of the period of limitation during the existence of the life interest will take place (*h*).

Occasions frequently arise in equity calling for the interposition of the court for the protection of suitors in —by the interposition of equity for

nington, 7 E. & B. 283, affirmed in Ex. Ch., 27 L. J., Q. B. 439, 4 Jur., N. S. 1102, 6 W. R. 682, *S. C.*; *Sturgis v. Darell*, 4 Ex., N. S. 622, affirmed in Ex. Ch., 6 Ib. 120.

(*c*) *Fergus v. Gore*, 1 Sch. & L. 107; *Burke v. Jones*, 2 Ves. & B. 275; *Hughes v. Wynne*, Turn. & R. 307; *Hargreaves v. Michell*, Mad. & G. 326; *Jones v. Scott*, 1

Russ. & M. 255; *Scott v. Jones*, 4 Cl. & F. 382, 397.

(*d*) *Ib.*

(*e*) *Burke v. Jones*, *supra*.

(*f*) 3 & 4 Will. 4, c. 27, s. 25.

(*g*) *Scott v. Jones*, *supra*; *Freak v. Crangfeldt*, 3 Myl. & C. 499; *Evans v. Tweedy*, 1 Beav. 55.

(*h*) *Hyde v. Dallaway*, *supra*. But see ante, pp. 519, 520.

protection of
the suitor ;

the prosecution of their claims by suspending, in effect, the period of limitation. But whether a court of equity will interfere to take from one in favour of another, that which would be a defence at law, depends upon what is called a good conscience (*i*).

In cases not provided for in terms by the Statutes of Limitation, and where courts of equity in deciding such cases either adopt, or proceed by analogy to, those statutes (*k*), those courts, where the equitable title is not barred by lapse of time, although the legal title is so barred (*l*), and in some cases even after the lapse of more than twenty years (*m*), are not prevented from doing justice according to good conscience, and for that purpose will remove the bar arising from those statutes.

On this principle, where pending a suit a fine has been levied (*n*), the court will restrain the setting up the fine in bar to an action of ejectment. So, where between the filing of a bill for an account and a general administration of assets, and the decree therein, the Statute of Limitations would at law become available against a claim, to allow the statute to have effect would be in the highest degree unjust, and contrary to all the practice of the court and to the merits of the case (*o*).

So, where the possession is protected by the court as a lawful possession by force of instruments, afterwards condemned by the court as fraudulent, it will not suffer length of time to prejudice a title, and will not

(*i*) 1 Sch. & L. 430.

(*k*) 19 Ves. 184.

(*l*) *Bond v. Hopkins*, 1 Sch. & L. 413; 2 Ball & B. 126 *et seq.*; *Blair v. Bromley*, 5 Hare, 542.

(*m*) See *Att.-Gen. v. Lord Dudley*, G. Coop. 146; *Charter v. Trevelyan*, 11 Cl. & F. 714; *Aylward*

v. Kearney, 2 Ball & B. 463; *Roche v. O'Brien*, 1 Ib. 330.

(*n*) *M'Kenzie v. Powis*, 4 Bro. C. R. 328; *Pincke v. Thorncroft*, 4 B. P. C. 92; 1 Sch. & L. 432

(*o*) *Anon.*, 1 Vern. 73; *Sirdefield v. Price*, 2 You. & J. 73.

permit the possession to be used whilst it was so protected (*p*).

Again, where by the interposition of the court to prevent an act rightfully or wrongfully intended the defendant has lost a remedy at law, the court will give him a remedy equivalent to that from which the interposition of the court of equity has debarred him (*q*).

Surviving partners may both in law and equity plead the Statute of Limitations in bar of the claim of a creditor of the firm, and that whether the partnership accounts have or have not been settled between themselves and a retired partner, or the estate of a deceased partner, and the estate of a deceased partner will be entitled to the same defence, although the partnership accounts have not been taken (*r*). But the simple question, whether the estate of a deceased partner will, notwithstanding the Statute of Limitations, continue liable, so long as the remedy is not barred against the surviving partner, and the estate of the deceased partner continues liable to contribution at the suit of the surviving partner, has not been decided (*s*). A modern writer considers the several liability of the deceased partner's estate to be within the direct operation of the statute, whether the legal liability of the surviving partners be or be not barred (*t*).

There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement; but if to an action for the original cause of

—by contract.
Not at law,
when.

(*p*) *Bond v. Hopkins*, 1 Sch. & B. 262.
& L. 413.

(*q*) See *Pulteney v. Warren*, 6 Ves. 73; *Morgan v. Morgan*, 2 Dick. 643; 2 Ch. Ca. 217; *Bond v. Hopkins*, 1 Sch. & L. 413; *Brown v. Newall*, 2 Myl. & C. 558; *O'Donel v. Browne*, 1 Ball

(*r*) See *Way v. Bassett*, 5 Hare, 55, 68.

(*s*) See *Braithwaite v. Britain*, 1 Keen, 206; *Winter v. Innes*, 4 Myl. & C. 101.

(*t*) Lindley on Partnership, 1042.

action the Statute of Limitations be pleaded, upon which issue is joined—proof being given that the action did clearly accrue beyond the time fixed by the statute—the defendant, notwithstanding any agreement to inquire, is entitled to the verdict(*u*). In other words, the direct operation of the statute at law cannot be there prevented by the private agreement of the parties.

In equity,
when.

In equity, however, such a contract, founded on a valuable consideration, might be enforced, and an injunction would be granted to restrain the pleading of the statute at law(*x*).

As to chattels
real derived by
the Crown
from a subject.

If the Statutes of Limitation in relation to the property of the Crown(*y*) do not extend to chattels real, and as the Crown is not within any of the other statutes of that nature, the time which has commenced against a subject in respect of such chattels, but not continued to the limit before they come to the Crown, will be suspended, and the prerogative will be available(*z*).

Not on dis-
abilities.

It has been said that the statute 3 & 4 Will. 4, c. 27, suspends the operation of its enactments during the disability of lunacy(*a*). But, as will be shown in the next chapter, the effect of the provisions as to disabilities would seem to be to extend the period of limitation.

As to advow-
sons.

When the possession of an advowson has once commenced adversely, and continues of that character during the whole of the prescribed period of limitation, no intermediate acknowledgment of the title of the rightful patron, as in the case of land and rent under the section 14, will suspend the period of limitation.

(*u*) Per Lord Campbell, 5 Moore, I. A. C. 70.

(*x*) *Supra*, p. 540.

(*y*) *Vide ante*, p. 324.

(*z*) See *Lambert v. Taylor*, 4 B. & C. 153.

(*a*) Per Wood, V.-C., *Manby v. Berricke*, 3 K. & J. 342.

CHAPTER VI.

THE EXTENSION OF THE SEVERAL PERIODS OF
LIMITATION.

SECTION I.

*The Extension as respects the Crown and the Duke
of Cornwall.*

THE period of limitation fixed by the statutes in relation to the property of the Crown is not extended. Extension for
the Crown, But the Crown, where it acquires property derivatively from a subject to whom, before such acquisition, the right to such property has accrued under, but is not barred by the 3 & 4 Will. 4, c. 27, although not within this statute (*a*), yet taken derivatively is, to the extent of the period which has already expired as against such subject, also bound (*b*); but, not being within the statute, will be entitled to such further period as, with that so expired, will complete the period of limitation prescribed by those statutes relating to the property of the Crown (*c*); and a grantee of the Crown will also be entitled to such further period as well as the Crown itself (*d*).

The observations just made, as respects the periods of limitations assigned to the Crown, apply equally to the Duke of Cornwall under the statutes affecting him (*e*). —and Duke of
Cornwall.

(*a*) Vide p. 248 *et seq.*

C. 153.

(*b*) *Rea v. Morrall*, 6 Pri. 24.(*d*) *Ib.*(*c*) *Lambert v. Taylor*, 4 B. &(*e*) Vide ante, p. 251 *et seq.*

SECTION II.

The Extension as respects other Persons.

For other
persons.

In various cases the several periods of limitation prescribed by the 3 & 4 Will. 4, c. 27, are under certain circumstances extended, and the rights are thus preserved for a longer period.

For a mort-
gagee, and
how.

In the case of a mortgage of land in the possession of the mortgagor, the period of limitation may be extended for the mortgagee, by the payment, or a series of payments, of any part of the principal or interest, although more than twenty years have elapsed since the right to enter first accrued (*f*)

The twenty years prescribed by the sect. 2 may be extended by an acknowledgment in writing (*g*); and, from time to time before that period has elapsed, by a series of such acknowledgments, and the right to land and to rent may be thus preserved for an indefinite period (*h*). In this respect the statute is so framed as that, if a man enter into possession by permission of the true owner, and without payment of rent, and give an acknowledgment in writing of the title, from that moment the possession becomes adverse, and time begins to run; and instead of the real owner having an admission of title, upon which he may rest, the effect is the very reverse; the adverse possession, in fact, commences, and the statute begins to run. In such cases, therefore, where the operation of the statute is so powerful, parties must be careful to get such new acknowledgments, from time to time, as will admit their title, and thus preserve the right (*i*).

(*f*) 1 Vict. c. 28; *Wrixon v. Vize*, 2 Con. & L. 138.

(*g*) Sect. 14.

(*h*) *Incorporated Society v. Richards*, 1 Con. & L. 58.

(*i*) *Scott v. Nixon*, 3 Dru. & War. 388; 2 Con. & L. 185, S. C.; *Burroughs v. M'Creight*, 1 Jo. & Lat. 290.

The extension by the sect. 15 was of a very partial and limited character, and is constantly becoming of less practical importance. That extension was only in those cases, in the terms of the section, where the possession, at the time of the passing of the act, was not adverse to the right of the claimant, as in cases of persons having rights under a common title, and of mortgagor and mortgagee (*k*). So also where a husband possessed of a term in right of his wife left her in possession of the land in order, as was assumed, to manage it for him, and she permitted her son to build upon the land a house and to live in it, on condition of supporting her, and he and his devisee held for more than twenty years, the possession was not adverse to her, and therefore not to her husband (*l*).

In cases of mortgage of land, in the possession of the mortgagee, the time for redemption may be extended, in effect, by an acknowledgment in writing signed by the mortgagee, or by a series of such acknowledgments from time to time before the time for redemption has elapsed (*m*). For a mortgagor, and how.

So, in case of charges upon land or rent, and of legacies, the time within which such charges and legacies are to be claimed may be extended by an acknowledgment, either in writing or by part payment, or by a series of such acknowledgments, before such time has expired (*n*). For claimants of charges on land and rent, and of legacies;

If, therefore, on the last day of the twenty years prescribed by the sects. 2, 28 and 40, an acknowledgment be given in accordance with the sect. 14, and the sects.

(*k*) See *Doe d. Burgess v. Thompson*, 5 Ad. & E. 532; *Doe d. Jones v. Williams*, Ib. 291; *Nepean v. Doe d. Knight*, 2 M. & W. 894; *Incorporated Society v. Richards*, 1 Dru. & War. 258; *Wrixon v. Vize*, 2 Con. & L. 188.

(*l*) *Doe d. Wilkins v. Wilkins*, 5 Nev. & M. 484; 1 Har. & W. 575, *S. C.*

(*m*) Sect. 28, 1 Vict. c. 28; *Wrixon v. Vize*, 2 Con. & L. 188.

(*n*) Sect. 40.

28 and 40, and so on for any number of times, the period of limitation may be extended indefinitely.

—and of arrears of rent, &c.

In the cases of arrears of rent, or of interest of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears, an extended period of limitation may be given by an acknowledgment in writing (*o*).

For persons under disabilities.

All the Statutes of Limitation, both ancient and modern, give to persons who are under certain disabilities a great degree of indulgence; but the indulgence is withdrawn from the time the disability ceases to exist (*p*).

Time of disability, how reckoned.

The degree of indulgence is regulated by the nature of the right, and is greater in certain cases, when the right is to be asserted in a personal action, than in certain other cases, when the right is to be asserted in an action real, or relating to realty. In the former cases the time, during which the disability, when existing at the accruer of the right, had existed, is not reckoned at all (*q*), but the period of limitation is reckoned from the time when the disability ceases (*r*); whilst in the latter cases the time during which, after the right has accrued, the disability existed, is reckoned as part of the period of limitation, but as in the case of acknowledgment (*s*) that period is suspended (*t*), or rather extended, for an additional period, commencing from the time when the disability ceases (*u*).

Difference between 3 & 4 Will. 4, cc. 42 and 27.

In this respect the 3 & 4 Will. 4, c. 42, differs from the c. 27 of the same session. By the former chapter the period of limitation does not commence during the

(*o*) Sect. 42.

(*p*) 13 C. B. 819.

(*q*) 21 Jac. 1, c. 16, ss. 3, 7; 3 & 4 Will. 4, c. 42, ss. 2, 3, 4.

(*r*) *Lafond v. Ruddock*, 13 C. B. 813.

(*s*) See ss. 14, 28, 40; *Scott v.*

Nixon, 3 Dr. & War. 388; 2 Con. & L. 185, *S. C.*

(*t*) *Manby v. Benwick*, 3 K. & J. 342.

(*u*) 21 Jac. 1, c. 16, ss. 1, 2; 3 & 4 Will. 4, c. 27, ss. 2, 16, 17, 18; *Thomas v. Thomas*, 2 K. & J. 79.

existence of disability, but only from the time when it ceases; thus, after fixing the period (*x*), persons under disability when the cause of action accrues, have the same period calculated from the time when the disability ceases (*y*). So that no limit to the period in respect of disabilities similar to that of forty years, under the c. 27, was requisite.

The disabilities specified in the 3 & 4 Will. 4, c. 27, are infancy, coverture, idiotcy, lunacy, unsoundness of mind, and absence beyond seas (*z*). Disabilities for extension.
Sect. 16, c. 27.

The meaning of the mental disabilities of idiotcy and lunacy is clear, but the meaning of unsoundness of mind, used, as it is here, in contradistinction to idiotcy and lunacy, is somewhat vague. The three terms are also used in the Fines and Recoveries Acts (*a*), but with the additional words, "whether found by inquisition or not." Unsoundness of mind, what,

Formerly, all these disabilities were designated by the general term *non sane memory* (*b*), or *non compos mentis* (*c*), or *insanæ mentis* (*d*), or, in English, *unsound mind* (*e*); and in one of the modern Statutes of Limitation (*f*), the term *non compos mentis* is also used. In the old Statute of Limitation (*g*) is no such disability.

Non compos mentis, or *insanæ mentis*, or unsound mind, is the generic state, and, in law, has a definite and well understood signification (*h*). The terms *fatuus et idiota*, however, have sometimes a more com-

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|---|--|
| (<i>x</i>) Sect. 3. | 538. |
| (<i>y</i>) Sect. 4. | (<i>e</i>) Plowd. 368; 3 Atk. 171, |
| (<i>z</i>) Sect. 16. | 173. |
| (<i>a</i>) 3 & 4 Will. 4, c. 74; 4 & 5 | (<i>f</i>) 3 & 4 Will. 4, c. 42. |
| Will. 4, c. 92 (I.). | (<i>g</i>) 32 Hen. 8, c. 2. |
| (<i>b</i>) 1 Ric. 3, c. 7; 4 Hen. 7, c. | (<i>h</i>) Litt. s. 405; Plowd. 368; |
| 24; Litt. s. 405. | Co. Litt. 246 b, 247 a; 4 Rep. 124, |
| (<i>c</i>) 17 Edw. 2, c. 10; 21 Jac. 1, | 127, 128; 2 Sch. & L. 804; 12 Ves. |
| c. 16; Co. Litt. 246 b, 247 a. | 450; 3 Atk. 171, 173; 1 Ridgw. P. |
| (<i>d</i>) 3 Atk. 171; 1 Ridgw. P. C. | C. 533. |

prehensive signification, including both *non compos mentis*, and *idiotia à nativitate* (*i*).

According to Lord Coke, the term *non compos mentis*, which is most sure and legal (*k*), is applied to four sorts of persons: 1. *Idiotia*, who from birth, by a perpetual infirmity, *fatui naturales* (*l*), is *non compos mentis*; 2. He who, by accident, wholly loseth memory and understanding; 3. A lunatic, who *aliquando gaudet lucidis intervallis*, called *non compos mentis*, so long as he has not understanding; and 4. He who by his own vicious act, as drunkenness, temporarily deprives himself of memory and understanding (*m*).

Idiotcy, therefore, is one species of *non compos mentis*, and is by nature (*n*); and lunacy is another species, but accidental or adventitious, and is either periodical or permanent (*o*).

—how arising, Unsoundness of mind arises in various ways (*p*), and is produced from various causes, some of a temporary, others of a permanent character (*q*).

When the question is whether a person be or be not of sound mind, the inquiry is whether or not he possessed his faculties, and possessed them in a healthy state. His mental powers may be still subsisting; no disease may have taken them away; and yet they may have been affected with disease, and thus may not have entitled their possessor to the appellation of a person whose mind was sound. Again, the disease affecting them may have been more or less general; it may have affected more, or it may have affected fewer, of the mental faculties; for the mind is one and indivisible, but acts variously, that is, remembering, fancying, reflect-

(*i*) *Beverley's case*, 4 Rep. 127 b.

(*k*) Co. Litt. 246 b.

(*l*) 17 Edw. 2, c. 9; 4 Rep. 126 a.

(*m*) Co. Litt. 247 a.

(*n*) 4 Rep. 124 b.

(*o*) *Rockfort v. Lord Ely*, 1 Ridgw. P. C. 517, 533.

(*p*) *Harrod v. Harrod*, 1 K. & J. 4.

(*q*) *Dimes v. Dimes*, 10 M. P. C. C. 428.

ing, the same mind in all these operations being the agent (*r*).

The phrase "partial insanity" is incorrect. The better expression is "insanity" or "unsoundness" always existing, though only occasionally manifest. . . . If the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, such a mind is not really sound on other subjects. It is only sound in appearance . . . the unsoundness always exists, but requires a reference to the peculiar topic, else it lurks and appears not. But the malady is there, and as the mind is one and the same, it is really diseased while apparently sound, and really its acts, whatever appearance they may put on, are only the acts of a morbid or unsound mind (*s*).

Unsoundness of mind imports the notion that the person is in some such state as is contradistinguished from idiocy and from lunacy, and yet such as make him a proper subject of a commission to inquire of idiocy or lunacy (*t*), or such as would justify a jury, in a commission of lunacy, in putting his property and person under the protection of the Chancellor (*u*). —import of,

In ascertaining whether, in any given case, unsoundness of mind of a character to subject the person to the operation of a commission of lunacy, exists, great difficulty often arises (*x*). Occasional unsoundness of mind, arising either from accidental and temporary causes, such as excess, or from mere weakness of intellect or mind, *infirmitas mentis* (*y*), being neither idiocy nor lunacy (*z*), between which and such weakness the boundary is narrow, is no ground for a commission (*a*). —and degree of, to support a commission of lunacy.

(*r*) *Waring v. Waring*, 6 M. P. C. C. 341. On this case see *Dyce Sombre v. Troup*, 1 Deane's E. R. 22.

(*s*) *Ib.*

(*t*) Per Lord Eldon, *Earl Portsmouth's case*, Shelford's Law of Lunatics, 104.

(*u*) Per Lord Wynford, *Blackford v. Christian*, 1 Knapp, 78.

(*x*) See *In re Dyce Sombre*, 1 M. & G. 116, 131; *Snooks v. Watts*, 11 Beav. 105.

(*y*) 3 Atk. 170.

(*z*) 2 Atk. 324.

(*a*) See *Lord Donegal's case*,

Those who may be improved by time or instruction, though of weak understanding, are not within the meaning of the words unsound mind, or unsound memory (*b*).

Unsoundness of mind, therefore, used, in the provision we are considering, in contradistinction to idiocy and lunacy, seems applicable to every case of mental defect or incapacity which, in law, is neither natural idiocy, nor lunacy, either periodical or permanent, nor mere weakness of intellect or mind.

Absence beyond seas.
Sect. 19.

No part of the United Kingdom of Great Britain and Ireland, nor the Channel Islands, nor any island adjacent to any of them under the dominion of the Crown, is beyond the seas within the meaning of the c. 27 (*c*).

The effect of this section is to make, for the purposes of the act only however, every part of the United Kingdom, with respect to every other part, and the Channel Islands, with respect to every part of the United Kingdom, not beyond the seas, but not for any other purposes (*d*).

So with respect to Scotland and Ireland, every other part of the United Kingdom, unless otherwise declared, would, in any statute applicable to them only, as to anything beyond seas, be in that position.

It has been doubted whether, with reference to the operation of the 3 & 4 Will. 4, c. 27, which has been adopted in the colony of New South Wales, Ireland is beyond the seas within the section 19, in relation to that colony (*e*). If this statute be adopted in any of

2 Ves. 208; *Bridgman v. Green*, Wilmot's Notes, 61; 2 Ves. 629; 3 Atk. 173; 1 Myl. & C. 543; *Manby v. Bewicke*, 3 K. & J. 342.

(*b*) See *Lord Ely's case*, 1 Ridgw. P. C. 520, referring to *Barnsley's case*, 3 Atk. 168; 2

Eq. C. A. 580; *Manby v. Bewicke*, *supra*.

(*c*) Sect. 19.

(*d*) *Battersby v. Kirk*, 2 Bing. N. C. 584; *Lane v. Bennett*, 1 M. & W. 70. On these two cases, see 8 M. P. C. C. 27 *et seq.*

(*e*) *Devine v. Holloway*, 14 M. P. C. C. 290.

the Channel Islands, the same doubt, in relation to the United Kingdom, would apply.

As in the former Statute of Limitations (*f*), so in the recent one (*g*), "beyond seas" is not to be interpreted literally, but, as to the foreign possessions of the Crown, may be synonymous, in legal import and effect, with the words "out of the territories" and "out of the realm" (*h*).

Absence in Ireland (*i*), or in any of the Channel Islands, or in any Island adjacent to any of them, being part of the dominions of the Crown, before the passing of the act, is no disability.

The disability must exist when the right first accrues. The right to a rent, being a rent within the section 1, first accrues on the last payment of it (*k*). Therefore, in several cases where, between the last payment and the next, the claimant becomes under disability, the disability will afford him no protection (*l*). In other words, the operation of the statute having commenced is not suspended.

When the disability must exist.

If when the right accrues, the person to whom it accrues be under any of these disabilities, the period of limitation of twenty years, although expired, is extended for him, or for those claiming through him, for a further period of ten years, from the moment the impediment is removed, that is, as soon as he is in the position of having no impediment to the assertion of his right (*m*), or dies, whichever event first happens (*n*).

Existing on accruer of right, time of limitation is extended.

Thus, where the person to whom the right first accrues dies under disability, leaving his heir also under

(*f*) 21 Jac. 1, c. 16.

(*g*) 3 & 4 Will. 4, c. 27.

(*h*) *Ruckmayboye v. Mottichund*, 8 M. P. C. C. 4. See also *Devine v. Holloway*, 14 Ib. 290; *Hogan v. Hand*, Ib. 310.

(*i*) *Ex parte Hassell*, 3 You. & C. 617.

(*k*) *Owen v. De Beauvoir*, 16 M. & W. 547, affirmed on error, *De Beauvoir v. Owen*, 5 Ex. 166.

(*l*) Ib.

(*m*) See *Lafond v. Ruddock*, 13 C. B. 813.

(*n*) Sect. 16.

disability, the heir must assert his right within ten years after the death of the ancestor (*o*), and cannot assert it after the expiration of that period, although himself continuing under disability (*p*).

Coverture.
Effect of, as to
chattels real of
wife surviving
husband.

Where the period of limitation has expired against a husband possessed of chattels real in right of his wife, and he afterwards dies leaving her surviving, the period will not be extended for her by reason of her disability; for whilst in the case of freeholds her disability would secure her the extension, for they are both seised, but in her right (*q*), in the case of chattels real he alone is possessed in her right (*r*), and he being barred, she would be also (*s*).

It has been said, however, that the legal *possession* of such chattels is in both, but that the *estate* is in her alone (*t*). But the Year Books (*u*), and, as just shown, Lord Coke, are distinct authorities against that view. A modern writer (*x*) also says, "the term remains in the wife, notwithstanding the coverture (*y*), though subject to the disposing power of the husband." Rolle, however, says "*Si un feme termor prist baron, uncore le terme continue en luy*," and refers to the Year Books just cited; which show, however, distinctly that during the coverture the term is in him alone, but if he die without disposing of it in his lifetime, and she survive, she will have it (*z*).

No extension
for disability
beyond forty
years.
Sect. 17.

The period, however, in which the right, after it first accrues, is to be asserted, is to be within forty years afterwards, although the claimant under disability when

(*o*) *Hogan v. Hand*, 14 M. P. C. C. 310.

(*p*) *Devine v. Holloway*, Ib. 290.

(*q*) *Polyblank v. Hawkins*, Doug. 329; *Robertson v. Norris*, 11 Q. B. 916.

(*r*) Co. Litt. 351 a.

(*s*) Ib. See also *Hales v. Petit*, Plowd. 253; *Doe d. Wil-*

kins v. Wilkins, 5 Nev. & M. 436.

(*t*) See 5 Nev. & M. 436, n. (*a*).

(*u*) 7 Hen. 6, 2; 9 Hen. 6, 52 b.

(*x*) 1 Bright's Law of Husband and Wife, 94, n. (*a*).

(*y*) 1 Roll. Ab. 342 e.

(*z*) Co. Litt. 351 a.

the right so accrues may remain under any one or more of such disabilities during the whole of the forty years, or the ten years from the time the disability ceases (a) be not expired (b).

Where a man and his wife seised in fee in her right discontinue the possession, the coverture of the wife will not, after the lapse of forty years, extend the period of limitation for the heir (c).

Coverture.
Wife's inheritance.

The case of *Doe v. Bramston* has been the subject of comment by an able writer. This decision, he says, appears to be open to much observation. To pass over the preliminary objection, that no inquiry seems to have been made whether the possession was adverse at the time of the passing of the act, and therefore, whether the 15th section did not apply (the action was commenced in 1835), it is to be observed that the judgment of the court was founded on the 17th section, which has for its object merely to prevent the period of limitation from being extended by disabilities beyond the period of forty years. In the case before the court there was no disability in question. On the birth of the son the husband had become tenant by the curtesy for his own life, and in his own right, during which time neither the wife nor her heir could be entitled to enter, and this occurred before the commencement of the adverse tenancy. After the birth of issue and during her husband's life, therefore, the wife was not under disability within the 16th and 17th sections, because she had no right to make an entry (d). The wife's title having first accrued to her son in possession on the death of the husband, the case comes within the protection of the 5th section, which gives the reversioner a new right on the determination of the particular estate,

Doe v. Bramston.

(a) Sect. 16.

3 Ad. & E. 63.

(b) Sect. 17.

(d) See Bac. Ab. Curtesy (E);

(c) *Doe d. Corbyn v. Bramston*,

2 Inst. 301, 309.

although he, or one through whom he claims, was formerly in possession (e).

If the case had been one of a conveyance by the husband of the wife's estate, or had depended on the 21 Jac. 1, c. 16, these observations would have been pertinent and well founded (f). But under the circumstances, and depending on the 3 & 4 Will. 4, c. 27, are not well founded. The judgment is not founded merely, or even principally, on section 17 of this statute, but on the sections 2, 3, 16 and 17, and the facts of the case bring it precisely within these sections. The persons actually in possession were not shown to have held under the ancestor of the plaintiff, and the title of the ancestor rested on no documents, but was merely evidenced by possession at an early period; and the report shows, and both sides seem to have admitted, that, at the passing of this act, the possession was adverse. The estate was the wife's, and she and her husband, the parents of the lessor of the plaintiff, having the fee in her right, were in possession, and more than forty years before the action was brought, discontinued the possession, and never afterwards acquired it, or exercised upon the property any act of ownership. Now by section 2 the action is to be brought within twenty years after the right to bring it first accrues. By section 3, when the person through whom another claims has been in possession, and while entitled thereto has discontinued the possession, the right is deemed to have first accrued at the time of such discontinuance of possession. By section 16, the disability of coverture extends the period for ten years after the disability ceases. But by section 17, the disability, in no case, can preserve the right beyond the period of forty years.

(e) 1 Byth. Conv. by Sweet, 13 Sim. 322; *Ravald v. Russell*, 38. 1 You. 9; *Ashton v. Milne*, 6 Ib.

(f) See *Jumpson v. Pitchers*, 369.

And the section 17 is unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date; and where a husband and wife seised in her right discontinue the possession of land, it is no answer to the positive limitation in this clause that the owner, being a married woman, her husband was tenant by the curtesy and their son's right of possession does not accrue until his father's death (*g*).

It has been contended that this section 17 is prospective only, and that therefore, notwithstanding it was treated in the case of *Doe v. Bramston* as retrospective, the question, that it applies to only those disabilities arising subsequent to the act, is still open (*h*). It is submitted, however, that the section cannot be so interpreted (*i*). That section retroactive.

A lease by a lunatic cannot be impeached after the lapse of forty years. But a covenant for perpetual renewal contained in the lease is simply void and acquires no validity (*k*). Lunacy.

Accumulative disabilities in the same person will not extend the period of limitation beyond the forty years (*l*), as might have happened under the law prior to this statute (*m*). No extension for accumulative disabilities in same person,

Disabilities in persons claiming through the person to whom the right has accrued dying under disability, did not before this statute (*n*), and do not now (*o*), extend the period of limitation. —or claiming through another dying under, after right accrued,

The disability of one of several coparceners (*p*), or other persons (*q*), did not before, and will not since, the —or of one coparcener,

(*g*) *Doe d. Corbyn v. Bramston*, 3 Ad. & E. 63.

(*h*) 2 Smith's L. C. 5th ed. 623.

(*i*) Vide post, Chap. IX.

(*k*) *Fulton v. Creagh*, 3 J. & L. 329.

(*l*) *Devine v. Holloway*, 14 M. P. C. C. 290.

(*m*) *Lessee of Supple v. Ray-*

mond, Hayes' Ir. Rep. 6. See also *Cotterell v. Dutton*, 4 Taunt. 826.

(*n*) *Doe v. Jesson*, 6 East, 80.

(*o*) Sect. 18; *Devine v. Holloway*, 14 M. P. C. C. 290.

(*p*) *Roe d. Langdon v. Rowleston*, 2 Taunt. 441.

(*q*) See *Perry v. Jackson*, 4 T. R. 516.

3 & 4 Will. 4, c. 27, s. 12, extend the period of limitation in favour of the other or others.

—nor under
sect. 15;

The section 15 contains no exception of disabilities, and the further term of five years given by this section is not extended by reason of any disability of the claimant (*q*).

—nor when
ensuing after
right accrued.

If a disability ensues after the right has first accrued, but before the passing of the act, no extension of the period of limitation is given (*r*), for when the time has commenced running it does not stop (*s*).

Disabilities
may be cumu-
lative.

Disabilities may be accumulative. Infancy, coverture, lunacy, absence beyond seas, may co-exist in the same person (*t*); and yet, as any of them cease, the privilege attached thereto will cease also, whilst the others may remain (*u*).

No distinction
between volun-
tary and in-
voluntary
ones.

No distinction is made between disabilities which are voluntary, as marriage, absence beyond seas, and those which are involuntary, as idiotcy, lunacy, unsoundness of mind; for, as Lord Kenyon said (*x*), to refine and to make nice distinctions between such cases would be mischievous; and, as O'Grady, C. B., also said (*y*), lead to endless difficulties, as in the cases of persons of nonsane memory, when the disability often arises from the act of the party. In both cases, when the disability is once removed, the time begins to run (*z*).

The disability of imprisonment is one of the disabilities mentioned in the statutes as to fines (*a*) and in the old Statutes of Limitation (*b*), but is omitted in the modern Statutes of Limitation (*c*). And even in those

(*q*) *Scott v. Nixon*, 3 Dru. & War. 388.

(*r*) *Goodall v. Sherratt*, 3 Drew. 216.

(*s*) Plowd. 375. Vide supra, p. 536.

(*t*) See *Pelley v. Bascombe*, 4 Giff. 390.

(*u*) 2 Atk. 614.

(*x*) *Doe v. Jones*, 4 T. T. 300.

(*y*) *Lessee of Supple v. Raymond*, Hayes' Ir. Rep. 6, 15.

(*z*) *Doe v. Jones*, supra.

(*a*) 1 Rich. 3, c. 7; 4 Hen. 7, c. 24.

(*b*) 32 Hen. 8, c. 2; 21 Jac. 1, c. 16.

(*c*) 2 & 3 Will. 4, cc. 71, 100, and the 3 & 4 Will. 4, cc. 27, 42.

cases to which the statute of 21 Jac. 1, c. 16, is still applicable, that disability is now removed (*d*). Imprisonment, when made a disability, was of a very rigorous character, often, indeed, equivalent to exile (*e*). In modern times, the rigour of imprisonment has been greatly mitigated. Hence the removal and the disregard, in the present day, of this disability (*f*).

On the sects. 28 and 40 of the 3 & 4 Will. 4, c. 27, arises the question whether the disabilities mentioned in the sect. 16 of that statute will also extend the periods of limitation fixed by those sects. 28 and 40.

Whether disabilities in sect. 16 extend the times fixed by sect. 28,

Prior to this statute the rule as to the redemption of mortgages in courts of equity proceeded either upon the Statute of Limitation (*g*), or by analogy to it (*h*), and with an allowance for disabilities as provided by the same statute (*i*). In the redemption of mortgages, however, now that courts no longer act by analogy, but under the express provision sect. 28 of the former of these two statutes (*k*), and unless the provision as to disabilities in a prior part of the statute be, by construction, extended to a mortgagor under disability when the possession or the receipt by the mortgagee commences, the period of limitation prescribed by this provision cannot be extended on that ground (*l*).

Lord St. Leonards has observed (*m*), there is no saving for disabilities of the mortgagor or his heirs in regard to the bar created by this provision. Now, it will be observed, that the sect. 16 of the c. 27 refers to the accruer of the right *as aforesaid*; that is, at law, under the different circumstances expressed in the preceding sections, and therefore ~~excludes the~~ case of the

(*d*) 19 & 20 Vict. c. 97, s. 10.

(*e*) See Plowd. 359, 360; Co. Litt. 259 a; 8 Rep. 100.

(*f*) 1 Real Prop. Rep. 44.

(*g*) 21 Jac. 1, c. 16.

(*h*) See *Foster v. Hodgson*, 19 Ves. 180, 184.

(*i*) *Jenner v. Tracy*, *Belch v.*

Harvey, 3 P. W. 287, n. (B.)

(*k*) *Berrington v. Evans*, 1 You. & Col. Ex. 434.

(*l*) Plowd. 374; *Beckford v. Wade*, 17 Ves. 87; ante, p. 533.

(*m*) Treat. New Statutes, ch. 1, s. 6, pt. 45.

redemption of a mortgage under a subsequent provision. This sect. 28, however, may be regarded in two ways, as supplemental to sect. 24, and as a substantive and independent enactment. Viewed in the latter way, the period of limitation for the redemption is absolute, and not to be extended by reason of any disability of the mortgagor (*n*); but viewed in the former way, the period is not absolute, but is to be extended by reason of such disability; for by the sect. 24 the time for bringing a suit in equity is the same as the time for making an entry or distress, or bringing an action at law, and consequently with a similar allowance for disabilities existing under similar circumstances; and if a suit for foreclosure be really a suit to recover either land or money (*o*), *à fortiori*, a suit for redemption is one species of suit in equity to recover land within that section, and consequently within the sect. 16. The sect. 28 relates exclusively to the rights of mortgagees, and is not controlled by the sect. 15 (*p*).

—and sect. 40.

The disabilities mentioned in the sect. 16 of the 3 & 4 Will. 4, c. 27, will extend the periods of limitation fixed by the sect. 40. Every charge on land within the latter section is an interest in land, and every interest in land, although of a mere chattel nature, is land within the meaning of the statute (*q*); and, therefore, as to such charges, the period of limitation may be extended by reason of the existence of these disabilities in the claimant of them, as in the case of land itself. So in the case of charges on a rent issuing out of land, they would be an interest in land.

In the case of legacies not charged on land, the extension of the period of limitation fixed by the sect. 40 depends on this section alone, and has been, and, but

(*n*) Plowd. 374; *Beckford v. Wado*, *supra*.

(*o*) See *Sinclair v. Jackson*, 17 Beav. 405, 410.

(*p*) *Browne v. The Bishop of Cork*, 1 Drn. & Wal. 700, 716.

(*q*) Sect. 1.

for a subsequent statute, would still be, questionable. No provision, or at least no adequate provision, said Wigram, V.-C. (*r*), is made for the interests of persons under disabilities, so far as the interests of such persons may be affected by some of the clauses of that act. The interest of such persons, if adequately protected at all, are so by force of the 4th, 5th and 7th sections of the 3 & 4 Will. 4, c. 42.

The subsequent statute just alluded to, however (*s*), has enacted, that the disabilities of imprisonment in the earlier Statutes of Limitation, and absence beyond seas, are not to be available, and hence arises the inference that these disabilities were available before this statute; for if not, the statute was useless (*t*); and if they were so available, so were and are the other disabilities mentioned in the sect. 16 of the 3 & 4 Will. 4, c. 27. This later statute, with reference to this consideration, is declaratory of the meaning of the legislature that the disabilities mentioned in the earlier sections of the 3 & 4 Will. 4, c. 27, as to land and rent, apply to the subjects embraced by the sect. 40 of the same statute (*u*).

Effect of
19 & 20 Vict.
c. 97, on that
question,

It seems to have been also considered, before the 19 & 20 Vict. c. 97, that the periods of limitation fixed by the sects. 41 and 42 of the 3 & 4 Will. 4, c. 27, were not extended by reason of the existence of any of the disabilities specified in the sect. 16 of this latter statute. In one case, indeed, in a claim for arrears of rent under the sect. 42, they were allowed for only six years, notwithstanding the disability of lunacy in the claimant for a much longer period (*x*). And in the subsequent case of *Owen v. De Beauvoir* (*y*), the court remarked that this section has no proviso in favour of persons under disability. There was certainly more difficulty

—and as to
sections 41 and
42.

(*r*) 2 Hare, 333.

(*s*) 19 & 20 Vict. c. 97, s. 10.

(*t*) See *Battersby v. Kirk*, 2 Bing. N. C. 584.

(*u*) See *Baggett v. Meux*, 1 Phill. 627.

(*x*) *Humfrey v. Gory*, 7 C. B. 567.

(*y*) 5 Ex. 182.

on this point, as respects these two sections, than as respects the sect. 40. The 19 & 20 Vict. c. 97, however, just noticed in relation to this latter section, has removed all difficulty, and in effect extends the periods of limitation, in cases of disability, in the matters within each of these sections.

The terms of the sects. 40, 41, and 42, 3 & 4 Will. 4, c. 27, "next before the commencement of the action or suit," and the terms of the sect. 10 of the 19 & 20 Vict. c. 97, "time of such cause of action or suit accrued," are equivalent or synonymous.

When executors of persons to whom right accrues when beyond seas must sue.

Under the old Statute of Limitations (z), in the case of a right of action on a simple contract accruing to a person when beyond seas, and who afterwards dies there without returning to this country after the accruer, his executors may sue, although more than six years elapse after the accruer. But whether in such a case they must sue within six years after his death is doubtful (a). The same principle would appear to be applicable in relation to claims by specialty under the 3 & 4 Will. 4, c. 42, s. 4, and to claims under the sects. 40, 41, and 42 of c. 27 of the same session.

Extension of time for spiritual and eleemosynary corporations sole.

The general period of limitation fixed by the sect. 2 of the 3 & 4 Will. 4, c. 27, is also extended, where the claimant is a spiritual or an eleemosynary corporation sole, from twenty years to, at least, sixty years, and by possibility even exceeding this latter period, in the event of the office or benefice, in respect whereof the claim is made, being held by two persons in succession and by a third person for six years, who may therefore hold for more than sixty years (b).

For persons entitled to pursue certain remedies at

The period of limitation fixed by this statute is, in effect, also extended in two other instances; one, where, on the 31st of December, 1834, a claimant, who has not

(z) 21 Jac. 1, c. 16, ss. 3, 7.

(a) *Townsend v. Deacon*, 3 Ex.

706. See also *Town v. Mead*, 16 C. B. 123.

(b) Sect. 29.

a right of entry to any land, may be entitled to maintain any of the writs or actions abolished (c), might have brought them before the 1st of June following, in case of being maintainable had the act not passed, although twenty years had expired; the other, when on the former day his right of entry had been taken away by descent cast, discontinuance, or warranty, and who might maintain any of such writs or actions, he may maintain them after the latter day, but only within the period during which by the act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away (d). But after the former day no right of entry or action for recovering land can be defeated by any one of the three modes just specified (e).

certain times only.

The several extensions of the periods of limitation on account of disabilities here noticed are in relation to land and to rent only, according to the meaning given to those terms by the sect. 1 of the 3 & 4 Will. 4, c. 27, and not in relation to advowsons.

No extension for disabilities as to advowsons.

Neither the 21 Jac. 1, c. 16, nor the 3 & 4 Will. 4, c. 27, contains any provision where any person against whom any claim arises is under disability, but only where claimants are under disability. The reasons for this distinction were given by the court in *Fannin v. Anderson* (f), and by Maule, J., in *Towns v. Mead* (g). In the reign of Anne (h), provision was made in certain cases of simple contract (i) for the disability of absence beyond seas of a defendant; and in the reign of William the Fourth (k), in cases of specialty debts, provision was also made for the like

Or of persons against whom claim arises.

Exceptions as to personal actions.

(c) Sect. 36.

(d) Sect. 38.

(e) Sect. 39.

(f) 7 Q. B. 811, 828.

(g) 16 C. B. 123, 135.

(h) 4 Anne, c. 16, s. 19.

(i) See *Williams v. Jones*, 18 East, 439; *Fannin v. Anderson*,

supra; *Towns v. Mead*, supra; *Story v. Fry*, 1 You. & C. C. C. 603. On the former two cases, see *Roddam v. Morley*, 1 De G. & J. 1; *Coope v. Cresswell*, L. R., 2 Eq. C. C. A. 112, 126.

(k) 3 & 4 Will. 4, c. 42.

disability in him, and also for the like disability of a person making an acknowledgment (*l*). And now the disability of absence beyond seas of one of several joint debtors is not to give to the creditor any time within which he is to commence his action against the other or others who, when it accrues, may not be so absent, and he may sue the absent debtor on his return, notwithstanding he has already recovered against the other or others (*m*).

In *Roddam v. Morley* (*n*), Lord Cranworth, C., after observing that *Fannin v. Anderson* and *Towns v. Mead* proceeded on the 21 Jac. 1, c. 16, s. 7, and the 4 Ann. c. 16, s. 19, said he did not see why a similar principle should not warrant the holding (if such a case should arise) that an acknowledgment made abroad by one of several persons liable on a bond, who was resident abroad when the cause of action arose, would keep alive the bond in its integrity against all parties liable.

But not under
c. 27.

But in cases within the 3 & 4 Will. 4, c. 27, when the right has once accrued, neither such disability, nor any other, of the person against whom the claim arises, will extend the period of limitation prescribed by this latter statute (*o*).

Extension for
disabilities as
to claims under
2 & 3 Will. 4,
cc. 71, 100.

As regards the periods of limitation prescribed by the 2 & 3 Will. 4, cc. 71 and 100 (*p*), those periods are not, in form, but are in effect, extended by reason of the disabilities of infancy, idiotcy, *non compos mentis*, and coverture. The period of those disabilities is simply excluded from those periods of limitation, except only in those cases where the right or claim is thereby declared to be absolute and indefeasible. It

(*l*) Sects. 4, 5.

(*m*) 19 & 20 Vict. c. 97, s. 11.

(*n*) 1 De G. & J. 1.

(*o*) See *Jones v. Tuberville*, 2 Ves. jun. 14; *Rock v. Cooke*, 1 De

G. & S. 675; *Towns v. Mead*, supra; *Fladong v. Winter*, 19 Ves. 196.

(*p*) Vide ante, pp. 426-429, pp. 432-435.

may also be remarked, that in each of these two statutes the term *non compos mentis* is used, and not either lunacy or unsoundness of mind, as in 3 & 4 Will. 4, c. 27 (q).

Amongst the disabilities mentioned in the two statutes just cited, absence beyond seas is not included, and therefore is not available (r); and in neither of them is any restriction as to the continuance of the disabilities mentioned, as in the 3 & 4 Will. 4, c. 27.

None for
absence beyond
seas, or con-
tinued.

(q) Vide *supra*, p. 547 *et seq.*

(r) See Plowd. 371; *Beekford v. Wade*, 17 Ves. 87.

CHAPTER VII.

THE OPERATION AND EFFECT OF THE STATUTES OF
LIMITATION ON THE EXPIRATION OF THE PERIODS
OF LIMITATION.

In general
affect the
remedy only,
and not the
right.

STATUTES of Limitation or prescription, considered in their true light, are ordinarily simple regulations of suits and not of rights. They regulate the times in which rights may be asserted in courts of justice, and do not purport to act upon those rights. They affect the remedy and not the merits, they go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense, and their object is to fix certain periods within which suits shall be brought (*a*). They do not extinguish, but deprive the claimant of his remedy to enforce, the claim, and thus render it inefficacious, and induce a presumption that it is extinguished and discharged (*b*); and most of these statutes, whether applied to rights in or to personal property, or to those in or to real property, have been so framed (*c*).

In the language commonly used in courts of law, the demand is not extinguished, but only the remedy barred. But this expression must not be supposed to carry too much with it. The statute furnishes an absolute legal answer to the demand of the claimant, and in the sense of a legal obligation enforceable by law, it does there-

(*a*) Story's Conflict of Laws, ss. 576, 582, 582 a, 582 b; *The British Linen Co. v. Drummond*, 10 B. & C. 903; *Huber v. Steiner*, 2 Bing. N. C. 202; *Higgins v. Scott*, 2 B. & Ad. 418; *Kuokma-hoye v. Mottichund*, 8 Moore, P. C. C. 4; *Williamson v. Naylor*, 3

You. & C., Ex. 208.

(*b*) 1 Poth. by Evans, 450, 464.

(*c*) 21 Jac. 1, c. 21; 9 Geo. 4, c. 14; 3 & 4 Will. 4, c. 42; 16 & 17 Vict. c. 113; 19 & 20 Vict. c. 97; *Bell v. Bell*, Lloyd & G. temp. Plunket, 44.

fore extinguish the debt at his volition. But it is only on his volition; the courts of law having always held that it was optional with the defendant to plead the statute or not, and that if he did not, the law would treat the demand as an existing obligation, and lend the process of the court to enforce its discharge (*d*).

Some of these statutes, however, applied to real property have been directed to the rights themselves, as in the case of those statutes of this nature, which have been applied to the Crown exclusively (*e*), for it was not bound by the ordinary Statutes of Limitation (*f*), and to the Duke of Cornwall (*g*); and have not merely regulated the times within which the Crown and the Duke are to assert their rights, but have, at the same time, excluded those rights by confirming the title of the persons having held the property during those times. So also in the case of the Statute of Non-claim after a fine (*h*), and the old statute, "The Act of Limitation with a proviso" (*i*), and that for the limitation of actions and suits relating to real property (*j*).

Certain statutes as to real property in England and Ireland affect the right.

In Scotland the laws of this nature are of two kinds; those of limitation, which bar the remedy only, and those of prescription, which bar the right; and the latter are, either negative, precluding the demand of a debt after certain periods, but not operating an extinction of property, although they sometimes fortify a title, or positive, establishing a right of property in land, and rendering a title unexceptionable after a long uninterrupted possession by a person as owner on a title apparently good (*k*).

So in Scotland,

(*d*) *Coombs v. Coombs*, 15 L. T. R., N. S. 329.

(*e*) 21 Jac. 1, c. 2; 9 Geo. 3, c. 16; 48 Geo. 3, c. 47; 3 Inst. 188.

(*f*) Vide *supra*, p. 242 *et seq.*

(*g*) 7 & 8 Vict. c. 105.

(*h*) 4 Hen. 7, c. 24; *Bell v. Bell*, Lloyd & G. temp. Plun-

ket, 44.

(*i*) 32 Hen. 8, c. 2, s. 6. See Brooke's Reading, 180.

(*j*) 3 & 4 Will. 4, c. 27.

(*k*) Bell's Principles of the Laws of Scotland, ss. 586, 605, 606, 2002, 2016, 2017; *ante*, pp. 25, 26.

—and some colonies.

So the Statutes of Limitation or possessory laws of some of the British colonies, not merely bar the legal remedies, if the parties do not proceed within a certain time, but convert a possession for that time into a positive absolute title against all the world; and after such possession the possessor may give the statute in evidence or plead it in bar, not, as our statute says, "of certain legal remedies," but in bar in any suit or suits, claim or demand to be brought or made against him by the Crown or any other person whatsoever (*l*).

In statutes applied to incorporeal rights.

Again, with respect to certain incorporeal rights claimed in, upon, or over lands, those rights, after the enjoyment under certain circumstances, for certain definite periods, without interruption, are vested in the person or persons who have exercised them, and rendered absolute and indefeasible (*m*).

SECTION I.

The Statutes in Relation to the Crown and the Duke of Cornwall.

Affirm the estate of the subject.

These statutes not only bar the remedy of the Crown and the Duke of Cornwall after the expiration of the period of limitation, or negative and exclude the right and title of the Crown and the Duke, but affirm and establish the estate of the subject (*n*).

Lord Ellenborough, indeed, said (*o*), that the statute of the 9 Geo. 3 does not give a title. It only takes away the right of the Crown, or those claiming from the

(*l*) *Beckford v. Wade*, 17 Ves. 87; 8 Burge's Comm. on Colonial and Foreign Laws, 102; 1 Howard's Colonial Laws, passim.

(*m*) 2 & 8 Will. 4, cc. 71, 100.

(*n*) 21 Jac. 1, c. 2; 9 Geo. 3,

c. 16; 48 Geo. 3, c. 47; 3 Inst. 188; 7 & 8 Vict. c. 106; *Tutill v. Rogers*, 1 Jo. & Lat. 38.

(*o*) *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

Crown, against such as have held an adverse possession against it for sixty years. But Lord Coke, in his commentary on the 21 Jac. 1, c. 2 (*p*), which, in terms, is similar to, or rather the same, in this respect, as the 9 Geo. 3, c. 16, says distinctly that the statute not only excludes negatively the right and title of the Crown, but also establishes affirmatively the estate of the subject (*q*).

The case of *Goodtitle d. Parker v. Baldwin* was not one between the Crown and a subject, but between subject and subject, and the first possessor against the Crown had held possession for fifty years and upwards; on his death his widow entered and held possession for about two years, and then relinquished it in favour of the defendant, who held it for seventeen years; but, inasmuch as the Crown was restrained by statute from alienating the property, no presumption or grant from the Crown (*r*), in support of even a possession of such great length as that of the first possessor, could be made: he was held to have acquired no title upon which those claiming under him could recover against the defendant, although his possession had been for less than twenty years.

Goodtitle v. Baldwin.

The estate of the subject, however, is not confirmed by these statutes until after the period of limitation has expired; and a possession for a less period, although for more than twenty years, will not enable him, as it would between subject and subject (*s*), to maintain ejectment against a person who has been in possession for a period less than his own (*t*), although, as against the Crown, he would be protected until a judgment in intrusion against him (*u*); a proceeding

But not until the full time has expired.

(*p*) 3 Inst. 188.

(*q*) *Tutill v. Rogers*, 1 Jo. & Lat. 36.

(*r*) See 10 Moo. P. C. C. 527.

(*s*) *Doe d. Harding v. Cooke*, 7 Bing. 346.

(*t*) *Goodtitle d. Parker v. Baldwin*, 11 East, 488.

(*u*) 21 Jac. 1, c. 14; *Att.-Gen. v. Aubyn*, Wightw. 167; *Doe d. Watt v. Morris*, 2 Bing. N. C. 189.

where only a person is in possession of that which the Crown claims (*v*), and in which the onus of proving title in the first instance is upon the Crown (*x*).

Certain incorporeal rights made absolute.

Again, incorporeal rights enjoyed by any person in, over, or out of, lands of the Crown and the Duke of Cornwall, without interruption for the prescribed period, are made absolute and indefeasible (*y*); and in this respect the Crown and the Duke are placed on the same footing as a subject.

SECTION II.

The Statutes in Relation to Private Persons.

The statutes barring the right.

The Statute of Non-claim, upon the levying of a fine (*z*), barred the right after the expiration of five years from the levying, subject to allowance for disabilities (*a*); and the statute entitled "The Act of Limitation with a proviso" (*b*), in the absence of proof of seisin within the periods prescribed, and when traversed (*c*), not only limited the time for bringing writs for the recovery of real property, but also cut off and extinguished the right (*d*).

Those excluding the remedy only.

But the next Statute of Limitation (*e*), as far as it applied to real property, merely excluded the remedy of one person without giving the estate to the other (*f*).

(*v*) Hardr. 462; 1 H. L. C. 453.
(*w*) Wightw. 197, 198; *Att.-Gen. v. Parsons*, 2 M. & W. 23; *Att.-Gen. v. Jones*, 2 H. & C. 847.

(*y*) 2 & 3 Will. 4, cc. 71, 100.
(*z*) 4 Hen. 7, c. 24.
(*a*) *Bell v. Bell*, Lloyd & G. temp. Plunket, 11, 44.
(*b*) 32 Hen. 8, c. 2, s. 6.
(*c*) See 1 Jac. & W. 557.

(*d*) Sect. 6; Bro. Stat. Lim. 180.

(*e*) 21 Jac. 1, c. 21.

(*f*) See *Hunt v. Bourne*, 2 Salk. 442; *Davenport v. Tyrell*, 1 W. Bl. 675; *Beckford v. Wade*, 17 Ves. 87; *Incorporated Society v. Richards*, 1 Dru. & War. 258, 289; *Scott v. Nixon*, 3 Ib. 388, 402; *Kemmis v. Macklin*, 11 Ir. L. R. 372; *Williamson v. Naylor*,

The same statute, and those which are *in pari materia* with, and may be considered as supplemental to it (*g*), as applied to obligations by simple contract, as well as the statutes applied to those by specialty (*h*), and by judgment (*i*), are directed to the remedy only, and do not in any way touch the right; and the statutes applied to specialty debts give to the lapse of time the effect of an absolute bar to the remedy, instead of such lapse being used as evidence of payment or performance, as before the statute (*k*).

Amongst the many important amendments of the law of real property in the reign of William the Fourth fines and recoveries were abolished (*l*), and thus, in effect, for the future, practically repealing the Statute of Non-claim; all actions real, possessory and droitual, were abolished; and times of limitation of actions and suits relating to real property were again prescribed, and also applied to matters not before affected by the old statutes, without however expressly abrogating any of them on the same subject. Thus a time of limitation was fixed within which suits for the redemption of mortgages, and actions and suits for the recovery of money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, and other claims (*m*), are to be brought, as shown in the preceding pages of this work.

Amendments
of law of real
property.

The legislation for Ireland, in the limitation of times for bringing actions and suits in relation to the redemption of mortgages, and to judgment and specialty debts, exhibits some singular features. The first enactment

Legislation as
to time for
redemption of
mortgages, and
for actions for
debts on judg-

3 You. & C., Ex. 208; *Bell v. Bell*, Lloyd & G. temp. Plunket, 44.

(*g*) 9 Geo. 4, c. 14; 16 & 17 Vict. c. 118, s. 24; 19 & 20 Vict. c. 97, s. 18.

(*h*) 3 & 4 Will. 4, c. 42; 16 &

17 Vict. c. 118 (L).

(*i*) 16 & 17 Vict. c. 118 (L).

(*k*) *Sanders v. Coward*, 15 M. & W. 48.

(*l*) 3 & 4 Will. 4, c. 74.

(*m*) 3 & 4 Will. 4, c. 27.

ments and
specialty, in
Ireland.

was in the reign of George the First (*q*), which continued in force through that and the three following reigns. In the reign of William the Fourth fresh enactments in relation to the limitation of actions and suits for the redemption of mortgages and for judgment debts were made (*r*). This statute, although taking no notice of, was considered as repealing the 8 Geo. 1 (*s*), and was followed by another enactment as to such debts (*t*); and this one was followed by another (*u*), which noticed the 8 Geo. 1, the former statute in the present reign, and others *pari materid*, but not that of William the Fourth, and declared that the 8 Geo. 1 had been *entirely* repealed by those other statutes, and yet at a still later period of the present reign (*v*), the sections 1 and 2 alone of the 8 Geo. 1 were expressly repealed (*x*).

Present regula-
tion of.

The law of limitation as to the redemption of mortgages, and to judgments, as charges on land, in Ireland, is now regulated by the 3 & 4 Will. 4, c. 27; and, as to judgments affecting the person and specialty debts, is regulated by the 3 & 4 Vict. c. 105, and the 16 & 17 Vict. c. 113.

Extinguish-
ment of right,
3 & 4 Will. 4,
c. 27, s. 34.

Amongst the provisions of the 3 & 4 Will. 4, c. 27, is one in these terms:—"at the determination of the period of limitation by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period shall be *extinguished*" (*y*). This statute, therefore, in

(*q*) 8 Geo. 1, c. 4.

(*r*) 3 & 4 Will. 4, c. 27.

(*s*) *Morrrough v. Power*, Longf. & T. 644; *Cloncurry v. Piers*, 9 Ir. Eq. R. 407; *Farran v. Beresford*, 10 Cl. & F. 819.

(*t*) 3 & 4 Vict. c. 105.

(*u*) 3 & 9 Vict. c. 90.

(*v*) 16 & 17 Vict. c. 113.

(*x*) See *Cloncurry v. Piers*, 9 Ir. E. R. 407; *Kemmis v. Macklin*, 11 Ir. L. R. 372.

(*y*) Sect. 34.

plain and peremptory language, not only bars the remedy but extinguishes the right (z).

Judicial opinions, however, appear to differ as to the precise effect of this provision. Courts, both of law and of equity, have sometimes regarded the statute as having the effect of a transfer of the land, rent or advowson itself, and at other times the effect of a transfer of the estate and interest of the claimant therein (a). This, in the language of an able writer, would be, indeed, to confound the negative effect of the statute with the positive effect of a conveyance (b).

Interpretation
of that section.

In *Brassington v. Llewellyn* (c), the court said the statute expressly enacts, that after twenty years' possession against a former title, that title shall be deemed to be extinguished, and a new title created. The extinguishment of the title of the claimant is express, but there appears to be nothing, even by inference, as to the creation of a new one.

In *Randall v. Stevens* (d), Lord Denman said, according to section 34 of the statute, the right of entry would be extinguished; and in *Hanks v. Palling* (e), Coleridge, J., asked, with reference to a fee farm rent, the subject of the contract in the case, is the rent itself extinguished? Does the section 34 do more than extinguish the right to sue for it?

But the supposed effects of the statute are opposed to, not only the terms, but also the object and the spirit, of the statute itself; to the terms, for it is express that the right and title of the person claiming after the prescribed period of limitation has expired shall be

(z) *Malone v. O'Connor*, 9 Ir. Ch. Rep. 459, 470.

(a) See *Doe d. Jukes v. Sumner*, 14 M. & W. 39; 1 Jo. & Lat. 308; *Incorporated Society v. Richards*, 1 Dru. & War. 258, 289; *Scott v. Nixon*, 2 Con. & L. 185; 3 Dru. & War. 388, S. C.;

11 Ad. & E. 1025; *Doe d. Carter v. Barnard*, 13 Q. B. 945; 12 Ir. E. R. 68, 66; *Malone v. O'Connor*, 9 Ir. C. R. 459, 471.

(b) *Hayes on Conv.* 4 ed. 240.

(c) 27 L. J., N. S., Ex. 297.

(d) 2 Ell. & B. 641.

(e) 6 Ib. 668.

extinguished (*e*), and not that the land, rent, or advowson, and the estate and interest therein of the possessor, shall, as in the statutes relating to the Crown and the Duke of Cornwall (*f*), continue and be established; and to the object and spirit of the statute, for they are,—not any such transfer; for the land, rent or advowson is already assumed to be in the possession of another person, and that possession is the primary element for the operation of the statute, but—to quiet that possession.

Difference between that section and the statutes applied to the Crown and Duke of Cornwall.

Contrasted with the statutes applied to the Crown and the Duke of Cornwall, the section 34 of the 3 & 4 Will. 4, c. 27, differs materially from them. All these statutes alike take away the remedy, but those applied to the Crown and the Duke of Cornwall also expressly affirm and establish the estate of the subject (*g*), when in possession for the prescribed period; whereas the latter statute, at the same time, *extinguishes* the right and title of the claimant after the expiration of the period of limitation, but is totally silent, as respects the person in possession, both as to the nature of his possession and of his estate. Such person can hold the possession against all the world, except any one who has a better title. The result is that the possessor, however short his possession may have been, provided he has not recognized or admitted the title of the claimant (*h*), can maintain the possession (*i*). The extinguishment alone of the right and title of the person claiming against the person in possession, without

(*e*) *Kennedy v. Woods*, Ir. R., 1 C. L., Ex. 76; 2 Ib. 436, on error.

(*f*) Vide Sect. I. of this Chap.

(*g*) 8 Inst. 188; supra, p. 566.

(*h*) *Doe d. Groves v. Groves*, 10 Q. B. 486. On this case, see 12 Ir. E. R. 602.

(*i*) See *Doe d. Carter v. Bar-*

nard, 13 Q. B. 945; *Smith v. Lloyd*, 9 Ex. 562; *Keyes v. Powell*, 2 Ell. & B. 132; *Incorporated Society v. Richards*, 1 Dru. & War. 258; *Scott v. Nixon*, 3 Ib. 388; *Jones v. Jones*, 16 M. & W. 699; *Moore v. Doherty*, 5 Ir. L. R. 449; *Hobson v. Burns*, 13 Ir. L. R. 286.

showing a transfer of them to some one else, is sufficient (*k*).

In the case of tithes the extinguishment is of the right and title to the tithes themselves, and only as between two adverse claimants to the estate in them, when they belong to a person, other than a spiritual or eleemosynary corporation sole (*l*); and the extinguishment is not available for, and gives no advantage to, the persons who are bound to pay or render them as chattels (*m*).

Extinguishment as to tithes,

The extinguishment in the case of rent is of the estate in the rent altogether (*n*), and, as between two claimants of it, in favour of the one who has had the receipt of it; but, as between the claimant of the rent and the owner of the land charged with it, the extinguishment would be in favour of such owner (*o*).

—rent,

Advowsons generally, *eo nomine*, and not ecclesiastical benefices only, are mentioned in this section. But, as has been already observed, only this species of advowson is within this section (*p*).

—what advowsons,

Although a mortgage has been made more than twenty years ago, that is not of itself evidence against a purchaser that it is paid off, or barred by the Statute of Limitations; yet if evidence can be furnished that no interest has been paid for twenty years, the mortgage would be extinguished under the sect. 34 (*q*).

—mortgages.

A mortgage of renewable leaseholds was made in 1806. The mortgagor died in 1817. The mortgage was transferred in 1839, and the widow of the mortgagor, who was also the tenant for life under his will, joined in the transfer, which stated that all interest on

Gregson v. Hindley.

(*k*) 2 De G., M. & G. 477.

550; *James v. Salter*, 2 Bing. N. C. 518; 3 Ib. 544.

(*l*) See *Dean and Chapter of Ely v. Bliss*, 2 De G., M. & G. 459.

(*o*) *James v. Salter*, supra.

(*p*) Vide ante, p. 358.

(*m*) *Ib.*; *Shiel v. Incorporated Society*, 10 Ir. Eq. R. 411.

(*q*) See *Spunner v. Walsh*, 10 Ir. E. R. 386, 404; *Gregson v. Hindley*, 10 Jur. 383.

(*n*) Per Parke, B., 16 M. & W.

the mortgage had been paid. The transferee was trustee for the widow, who advanced the money, and she died in 1842. In 1846 the transferee filed a bill against the legatee in remainder of the mortgagor, to compel him to obtain a renewal of the lease. The bill contained no allegation, and no evidence was adduced, of the payment of any interest from the mortgagor's death to the time of the transfer, and the defendant relied on the Statute of Limitations as a bar. The court said the case was very peculiar. The equity of redemption was devised to A. for life, with remainder to B. Now suppose the fact was, that for more than twenty years no interest had been paid during A.'s life, it then became a serious question whether, after the reversioner has obtained the benefit of the statute, it would be competent for the tenant for life to create a redeemable mortgage by her own act. The plaintiff sought to have liberty to prove that payments of interest were made from time to time. But the court said that that was not consistent with the statement in the transfer, as that might mean that a lumping sum had been paid. The grossest fraud might be practised on a tenant in remainder, as for a mere sixpence the tenant for life might sign an acknowledgment that no interest was due. The bill was dismissed, but without prejudice to filing a new one (r). Neither in the argument nor by the court was any allusion made to the fact, that the person entitled to the rents out of which the interest was payable, and the person entitled to the interest was one and the same, thus preventing the operation of the statute (s).

On the other hand, where a mortgagee has obtained the possession or the receipt of the profits of any land,

(r) *Gregson v. Hindley*, 10 Jur. 383.

(s) *O'Fallon v. Dillon*, 2 Sch. & L. 13; *Burrell v. Earl of Egremont*, 7 Beav. 205; *Kirkwood v. Lloyd*, 12 Ir. E. R. 585; *Hyde v. Dallaway*, 2 Hare, 528; *supra*, pp. 519, 520, 527.

or the receipt of any rent comprised in the mortgage, the title of the mortgagor, or his right of redemption, after the lapse of twenty years next after the possession or the receipt has been so obtained, without any acknowledgment of such title or right, and the mortgagee is not bound to pay as well as entitled to the interest on the mortgage (*t*), would, under the sects. 28 and 34, be extinguished.

In the recent case of *Stansfield v. Hobson*, however, *Stansfield v. Hobson*. the mortgagee had been in possession for nearly twenty-five years, without making any acknowledgment, and after the lapse of more than twenty years made an acknowledgment in writing of the title of the mortgagor or of his right to redeem, and the acknowledgment was treated, both at the original hearing at the Rolls (*u*) and on appeal to the Lords Justices (*x*), and notwithstanding the lapse of twenty years before it was given, as recognizing such title or right to be still subsisting. But by the sects. 28 and 34, the title or right was, at the time when the acknowledgment was made, extinguished. How then could the title or right be revived by a mere acknowledgment? and how could there be an acknowledgment of that which, at the time the acknowledgment was made, had no existence? The question, however, was not raised or even noticed either by counsel or the court on either occasion. It appears, however, from another report in a previous stage of the case (*y*), that the defendant was, in fact, not only the mortgagee, but one of several *trustees* of the equity of redemption, and therefore could not, apart from the acknowledgment, resist the redemption.

A question arises whether a charge on land, or on rent, within the sect. 40, as well as the land or the rent itself subject to the charge, is extinguished, or whether —charges on land or rent,

(*t*) *Hyde v. Dallaway*, 2 Hare, 528.

(*u*) 16 Beav. 286.

(*x*) 8 De G., M. & G. 620.

(*y*) 16 Beav. 189.

the remedy only is merely taken away; or, in other words, whether such a charge be within the sect. 34.

A sum of money secured by mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, is an interest in land, and an interest in land, although chattel merely, is land within the meaning of the 3 & 4 Will. 4, c. 27 (z), and after the expiration of the period of limitation, the right and title to land, as just shown, and therefore to such a sum, is extinguished (a); and the same would be the case as to arrears of rent, being rent within the meaning of sect. 1 (b), and of interest of money so charged within the sect. 42 (c).

— judgments.

Before the 3 & 4 Will. 4, c. 27, and until the 1 & 2 Vict. c. 110, and the 3 & 4 Vict. c. 105 (I.), although a judgment creditor had neither *jus in re* nor *jus ad rem* (d), he had, by statute (e), but not by the judgment *per se* (f), until the issue of an elegit, a general lien (g); but after the issue of an elegit, a specific lien (h) upon the land of the debtor; and at the time of the passing of the 3 & 4 Will. 4, c. 27, and until the passing of those acts in the present reign, the judgment was a charge on the land of the debtor within the meaning of that act (i), and those acts made judgments an express charge upon lands, whatever the interest, whether legal or equitable (k). Now, however, no judgment, statute, or recognizance, to be entered up after the 29th of July, 1864, is to affect any "land" of any tenure until such land has been actually delivered

(z) Sect. 1.

(a) See *Homan v. Andrews*, 1 Ir. C. R. 106.

(b) Vide *Paget v. Foley*, 2 Bing. N. C. 679, 689.

(c) *Henry v. Smith*, 2 Dru. & War. 881.

(d) 2 P. W. 491.

(e) 13 Edw. 1, c. 18.

(f) *Neats v. The Duke of Marlborough*, 3 Myl. & C. 407,

416, 417. See also 11 Cl. & F. 709.

(g) 2 Cru. Dig. 42, pt. 18; *Robleston v. Morton*, 1 Dru. & War. 171, 195.

(h) *Neats v. The Duke of Marlborough*, *supra*.

(i) *Henry v. Smith*, 2 Dru. & War. 881.

(k) See *Cathron v. Eads*, 1 Sm. & G. 423.

in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance. And the term judgment is to include registered decrees, orders of courts of equity and bankruptcy, and orders having the operation of a judgment; and the term land is to include all hereditaments, corporeal or incorporeal, or any interest therein (*l*). But whether a judgment be considered as a charge, or as a mere lien, either general or specific, it is so upon land within the terms of the c. 27 (*m*). The intention of the legislature was, that no proceeding whatever should be taken on a judgment after the lapse of twenty years from the time when the money secured by it became due, unless some payment should have been made on account of it, or some acknowledgment of it should have been given in writing within the period of twenty years (*n*).

In Ireland until a very recent period (*o*), if an action were commenced for the recovery of a debt due by bond or judgment due and payable twenty years before, the defendant might plead payment in bar of such action or suit and the plea was to be received and allowed as *an effectual bar thereof*, unless the plaintiff had commenced some action or suit for the recovery of such debt, or proved some interest or money had been paid, or other satisfaction made, on account thereof, within twenty years before such action or suit commenced (*p*).

This enactment has been considered (*q*), and has been recognized by the legislature of the United Kingdom in an act (*r*) relating not to the parties to judg-

Bonds and judgments in Ireland.

(*l*) 27 & 28 Vict. c. 112, ss. 1, 2. See *Re Bailey's Trusts*, 17 W. R. 393, 20 L. T. R., N. S. 168, 38 L. J., Ch. 237, *S. C.*

(*m*) See also *Scott v. Nixon*, 3 Dru. & War. 388; 2 Con. & L. 185, *S. C.*; *Thickwood v. Lloyd*, 12 Ir. E. R. 585, 596.

(*n*) Per Shadwell, V.-C., *Wat-*

son v. Birch, 15 Sim. 523, 524, 529.

(*o*) Vide ante, p. 569.

(*p*) 8 Geo. 1, c. 4, s. 2. See *Ottinell v. Farran*, 2 Ir. L. R. 110, San. & S. 218, *S. C.*

(*q*) *Murrough v. Power*, Longf. & T. 644; *Kemmis v. Macklin*, 11 Ir. L. R. 372.

(*r*) 9 Geo. 4, c. 35.

ments but only to the rights of purchasers of lands affected by them (*s*), as operating an extinguishment of the debt. But in *Kemmis v. Macklin* some of the court regarded the enactment as operating a bar and extinguishment not of the debt but of the remedy only, and as giving the debtor a special defence, which to secure the benefit of the enactment he must use as it expresses. This enactment however, although previously (*t*) declared to have been repealed, was afterwards expressly repealed in part (*u*).

Whether judgments obtained there more than twenty years before 3 & 4 Will. 4, c. 27, extinguished.

A judgment obtained more than twenty years before the 3 & 4 Will. 4, c. 27, and not revived or not acknowledged either in writing or by payment within that period, cannot be revived by *scire facias* against the heir or the terre-tenants of the conusor (*v*).

The Court of Common Pleas in Ireland however have held that a judgment, although obtained more than twenty years before an acknowledgment of it is made by the conusor, may be revived against him by *scire facias* on such acknowledgment made within twenty years before the proceeding to revive; in fact, that the sect. 40 of the 3 & 4 Will. 4, c. 27, operates only a suspension of the remedy, and not an extinguishment of the right. But the court said the decision was not intended to determine what would be the effect of an acknowledgment against third persons (*x*).

But if a judgment, as a charge on land within the sect. 40, be land within the sect. 1 (*y*), it is also land within the sect. 34, and therefore after the expiration of the period of limitation fixed by the sect. 40, without any acknowledgment of the judgment having been made within that period, is extinguished as much as in the

(*s*) *Farran v. Beresford*, 10 Cl. & F. 819.

(*t*) 7 & 8 Vict. c. 90; *Harty v. Davis*, 9 Ir. L. R. 28; *Kemmis v. Macklin*, 11 Ib. 375.

(*u*) Vide ante, p. 569.

(*v*) *Farran v. Beresford*, 10 Cl. & F. 819.

(*x*) *Harty v. Davis*, 13 Ir. L. R. 28.

(*y*) Ante, p. 576.

case of land itself, although the sect. 40 taken alone might operate a suspension of the remedy merely (z).

In *Toft v. Stephenson* (a), the claim was a lien for unpaid purchase-money. The contract for sale was made in March, 1811, and the purchase-money was to be paid on the 13th of May following. On the signing of the contract the purchaser was let into possession, and continued it down to 1834 without payment of any purchase-money or any interest, or making any acknowledgment in writing to the vendor or his representatives. In the latter year an acknowledgment in writing was given, and within twenty years after it the suit for the purchase-money and interest was commenced, and the acknowledgment was held to take the case out of the statute. The point, however, as to the extinguishment of the claim, and the effect of the extinguishment, was not noticed either in argument or by the court. On the last hearing of the case on appeal to the Lords Justices, Turner, L. J., said, that the time when the present right to receive the purchase-money first accrued depended upon the time when the title was shown upon the original contract. For the money did not become payable on the day appointed by the contract, the 13th May, 1811. The right would accrue upon the title being perfected by evidence. When so perfected the report does not show.

Lien acknowledged more than twenty years after created.

The right and title, not only of the person to whom the right originally first accrued, but of all persons claiming from or through him, are completely extinguished, and consequently any disposition or intended disposition of the property to which the right and title may be claimed is nugatory (b).

Disposition of property by claimant after time expired, nugatory.

In what way, after the expiration of the period of How, after

(z) See the judgment of Foster, B., *Ottiswell v. Farran*, 2 Ir. L. R. 120, 122, San. & S. 218, S. C.

G. 28; 5 Ib. 735, on appeal.

(b) *Kennedy v. Woods*, 1 Ir. R. C. L., Ex. 76. See also 17 Q. B. 372.

(a) 7 Hare, 1; 1 De G., M. &

time expired, right may be revived as to land,

limitation, the right and title of the person out of possession, and which have been extinguished, can be revived or restored, may be a question. The revival or restoration of a right and title to land cannot be accomplished under the doctrine of remitter by a re-entry; for that doctrine requires that at the time of the re-entry the former title should exist, but the sect. 34 has extinguished it, and mere entry (c) is not to be deemed possession (d).

—and to rent.

In the case of a rent within the meaning of the sect. 1 of the 3 & 4 Will. 4, c. 27, if, said Coleridge, J. (e), after nonpayment for twenty years a series of fresh payments were made, might not the old rent be said to exist without a fresh grant? It is submitted that a fresh grant would be necessary; for not only the right and title to it are, but the rent itself is, extinguished by the express terms of the statute.

Whether a right and title thus extinguished can be revived or restored by a mere acknowledgment will be the subject of consideration in the next chapter.

Right of the possessor to land may be waived before time expires.

Before the period of limitation has expired, the person in possession may waive whatever estate he may have acquired by it (f); but a constructive delivery of the possession by the person who has acquired it by holding for the full period will not divest his title so acquired (g).

Matters not affected by sect. 34 of c. 27.

The sect. 34, however, is expressly confined to right and title to land, rent and advowsons, including, under the term land, charges thereon (h); but as to legacies not charged on land, the personal estate, and any share of the personal estate of persons dying intestate (i),

(c) Sects. 10, 11.

(d) *Brassington v. Llewellyn*, 27 L. J., N. S., Ex. 297.

(e) *Hanks v. Palling*, 6 Ell. & B. 668.

(f) *Doe d. Groves v. Groves*, 10 Q. B. 486; 16 L. J., N. S. 297;

11 Jur. 558. On this case see 12 Ir. E. R. 602.

(g) *Jack v. Walsh*, 4 Ir. L. R. 254.

(h) Sects. 1, 40.

(i) 23 & 34 Vict. c. 38, s. 13.

such of the matters within sect. 42 as may not be deemed to be within that term; and as to specialty debts (*j*), the remedy only, and not the right itself, is barred, or, as it may be revived by simple acknowledgment, is merely suspended in accordance with the ordinary object of Statutes of Limitation (*k*), and as before these enactments were made. These provisions contain no words extinguishing the debt, as distinguished from the old statute, and it is still equally competent for the debtor to revive the debt (*l*).

The sect. 34 of the 3 & 4 Will. 4, c. 27, introduces an important distinction in the mode of pleading the statute. The necessity to plead a Statute of Limitation applies to only cases where the remedy only is taken away, and in which the defence is by way of confession and avoidance (*m*); and not where the right and title to the thing is extinguished and gone, and the defence is by denial of the right. Therefore in an avowry for rent, being a rent within the meaning of the sect. 1, after the expiration of the period of limitation, the defendant may plead *non tenuit*, and rely upon this statute without pleading it specially (*n*). So in ejectment (*o*). The same rule will apply in equity, and a plea should contain either a general allegation, or an equivalent with reasonable certainty, that the full period of limitation has elapsed since the title of the claimant accrued (*p*). So in the cases of redemption of mortgages (*q*) and charges on land (*r*), for a charge on land is an interest in land, and an interest in land is land within the statute (*s*).

Effect of that section in pleading the statute.

(*j*) 3 & 4 Will. 4, c. 42.

(*k*) Ante, p. 564.

(*l*) Per Brady, C., *Clinton v. Brophy*, 10 Ir. Eq. R. 139; *Harty v. Davis*, 13 Ir. L. R. 23.

(*m*) See *Sanders v. Coward*, 15 M. & W. 48.

(*n*) *Owen v. De Beauvoir*, 16

M. & W. 549, affirmed on error, *De Beauvoir v. Owen*, 5 Ex. 166.

(*o*) See *Hardman v. Ellames*, 2 Myl. & K. 732, 740.

(*p*) *Ib.*; 5 Sim. 640.

(*q*) Sect. 28.

(*r*) Sect. 40.

(*s*) Sect. 1; *supra*, pp. 576, 578.

Again, after the expiration of the period of limitation the person in possession need not show title in *himself*. His case is, that the estate under which the defendant claims has been extinguished, and consequently his own possession, whatever it is, cannot be disturbed, and, in pleading, the person in possession need only aver generally that twenty years have elapsed since the title of the defendant accrued, and need not state the special facts to bring it within the other sections (*t*).

Certain incorporeal rights made absolute.

In the case of corporeal hereditaments, including tithes (*u*), the right and title thereto are, as just shown, extinguished, whilst in the case of incorporeal rights claimed in or out of lands (*x*), those rights are rendered, after the expiration of the specified periods of the enjoyment thereof without interruption, absolute and indefeasible.

(*t*) *Jones v. Jones*, 16 M. & W. 699; *James v. Salter*, 2 Bing. N. C. 505; 3 Ib. 544.

(*u*) 3 & 4 Will. 4, c. 27, s. 1, 34.
(*x*) 2 & 3 Will. 4, cc. 74, 100.

CHAPTER VIII.

ACKNOWLEDGMENTS OF TITLE AND RIGHT.

SECTION I.

The Modes in which Acknowledgments are to be made.

ACKNOWLEDGMENTS, for the purposes of the Statutes of Limitation, are either express, in writing, or implied, by part payment (*a*), and sometimes must be express, and sometimes may be either express or implied.

Are either express or implied.

An acknowledgment in writing cannot be open to mistake, like the insecure and precarious testimony to be derived from the memory of witnesses (*b*), and is not open to fabrication like one merely by words, and being *litera scripta*, cannot deceive (*c*), and when required to be in writing parol evidence of it is excluded (*d*); but if the written acknowledgment be lost, parol evidence of it is admissible (*e*).

Express.

In general an acknowledgment in writing must be signed, which, in strictness, means the subscribing the name or mark (*f*). The acknowledgment in writing required by the Statutes of Limitation (*g*) must be a

Must be signed,

(*a*) See *Brandram v. Wharton*, 1 B. & Ald. 463; *Scholey v. Walton*, 12 M. & W. 510.

(*b*) 4 M. & P. 818; 7 Bing. 167.

(*c*) *Cleave v. Jones*, 6 Ex. 573.

(*d*) 1 Con. & L. 84; *Kirkwood v. Lloyd*, 12 Ir. E. R. 585, 600.

(*e*) See *Haydon v. Williams*, 4 Moo. & P. 811, 7 Bing. 168, *S. C.*;

Edmunds v. Downes, 2 Cr. & M. 459.

(*f*) Per Lord Ellenborough, C. J., 2 M. & S. 289.

(*g*) 9 Geo. 4, c. 14; 3 & 4 Will. 4, cc. 27, 42; 16 & 17 Vict. c. 113, s. 24 (1.); *In re Clendinning*, 9 Ir. C. R. 284; 23 & 24 Vict. c. 38, s. 13.

writing with the solemnity of a signature, although by an account stated on one side only as distinguished from a settlement of accounts between the creditor and the debtor (*g*), and nothing short of that will bind the party (*h*).

—and how.

The signing must be, either by an actual signature of the name, or something intended by the writer to be equivalent to a signature; such as a mark by a marksman (*i*), or by stamping (*j*); or if a man be in the habit of printing his name instead of writing it, he may be said to sign by his printed, as well as by his written, name (*k*),—at least, where the printed name is recognized by, and brought home to, the party as having been printed by him or by his authority, so that the printed name is appropriated to the particular instrument (*l*); or by contraction (*m*); or even initials (*n*); and in the case of a will (*o*). But the identity of the writer, without his name, initials or mark, in or to the writing, is not sufficient (*p*).

Cases, indeed, may arise where a total inability of parties to sign may exist, but the nature of the signature which is necessary to comply with the requisites of the statutes is such as to make it almost impossible to suppose a case in which a party could not make such a signature as would satisfy the statute (*q*).

But an affidavit signed with the mark of the deponent when abroad in such a state of disease at the time as to

(*g*) *Pott v. Clegg*, 16 M. & W. 321; *Bristow v. Miller*, 11 Ir. L. R. 461.

(*h*) See *Willis v. Newham*, 3 You. & Jer. 519, 524.

(*i*) *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, Ib. 504; *Selby v. Selby*, 3 Mer. 2.

(*j*) See *Schneider v. Norris*, 2 M. & S. 286; *Bennett v. Brumfit*, 17 L. T. R., N. S. 213.

(*k*) See *Saunderson v. Jackson*, 2 Bos. & P. 238.

(*l*) *Schneider v. Norris*, sup.

(*m*) *The Queen v. Bradley*, 3 E. & E. 643.

(*n*) *Lord St. John v. Boughton*, 9 Sim. 219.

(*o*) *Re Christian*, 2 Rob. 110; *Re Amiss*, Ib. 116; *Re Ashmore*, 3 Curt. 756.

(*p*) *Selby v. Selby*, 3 Mer. 2.

(*q*) *Hyde v. Johnson*, 2 Bing. N. C. 776; *Holshaw v. Langley*, 11 L. J., N. S. 17; *Lessee of the Corporation of Dublin v. Judge*, 11 Ir. L. R. 8.

be unable either to read it, or to attach his signature, and as to render it necessary to get the British consul at Boulogne to read it over to him, was considered as not the act of the deponent, but of the person who prepared the affidavit, and therefore not an acknowledgment within the Common Law Practice Amendment Act (Ireland, 1853) (*r*), which is in the same terms as Lord Tenterden's Act (*s*).

In general, for the purposes of the Statutes of Limitation (*t*), as well as for the purposes of the Statute of Frauds (*u*), the position of the signature is immaterial. The writing is to be signed, not the name of the person subscribed to it. The signature is to have the effect of giving authenticity to the whole instrument, and if the name is inserted *so as to have that effect*, it signifies little in what part of the instrument it is found (*x*). The name need not, as in the case of a witness attesting the execution of a will (*y*), be subscribed (*z*). The object of all these statutes is merely to authenticate the genuineness of the document; and when the person authenticates it by writing his name at the beginning, or in the body of it, that is his signature (*a*). But in the case of wills the signature of the testator is to be placed at the foot or end of them (*b*). The witnesses to a will are to subscribe it, and the position of their signatures may be most material (*c*).

The position of the signature.

(*r*) 16 & 17 Vict. c. 113, s. 24; *In re Clendinning*, 9 Ir. C. R. 284.

(*s*) 9 Geo. 4, c. 14; *Hyde v. Johnson*, 2 Bing. N. C. 776.

(*t*) *Bayley v. Ashton*, 12 Ad. & Ed. 493; *Lobb v. Stanley*, 5 Q. B. 574; *Holmes v. Mackrell*, 3 C. B., N. S. 789.

(*u*) *Stokes v. Moore*, 1 Cox, 219; *Welford v. Beazely*, 3 Atk. 503; *Coles v. Trecothick*, 9 Ves. 234; *Morrison v. Turnour*, 18 Ib. 175; *Ogilvie v. Foljambe*, 3 Mer. 53; *Selby v. Selby*, Ib. 2; *Probert v. Parker*, 1 Russ. & M. 625;

Bleakley v. Smith, 11 Sim. 150; *Saunderson v. Jackson*, 2 Bos. & P. 238; *Schneider v. Norris*, 2 M. & S. 286; *Allen v. Bennet*, 3 Taunt. 169.

(*w*) Per Eyre, B., *Stokes v. Moore*, 1 Cox, 219, 223.

(*y*) 1 Vict. c. 26, s. 9.

(*z*) *Lobb v. Stanley*, 5 Q. B. 574; *Holmes v. Mackrell*, 3 C. B., N. S. 789.

(*a*) See *Lobb v. Stanley*, sup.; *Homes v. Mackrell*, sup.

(*b*) 1 Vict. c. 26, s. 9.

(*c*) *In the Goods of Wilson*, 1 L. R., P. & D. 269.

As applicable,
or inapplicable,
to the entire
writing.

It cannot, however, be laid down, simply and without qualification, that it is immaterial in what part of a paper you find the signature of the party to be bound by it; it is rather true to say that, if you find it at the foot of the matter written, it is to be taken conclusively to apply to the whole, unless there be something expressly to rebut that presumption; and that if you find it anywhere else, it *may* apply to the whole, if upon the evidence you find that the party signing so intended. Where the intention to sign is found, and the signature is so placed as apparently to apply no more to one part than another, there can be no reason, *primâ facie*, to consider it otherwise than as intended to apply to the whole; but where the contents of the paper are divisible, and the signature is placed under or opposite one portion only, the question, whether it applies to all, or only to that one portion, is still purely one of intention. Now, wherever that question arises, it must be for the jury. These principles may be collected from the decisions on the Statute of Frauds, both as to wills and contracts (*d*).

The mere introduction, however, into the instrument, by the person preparing it, of the names of the persons concerned, is not a sufficient signature, although, if after the instrument is prepared, those persons adopt it and deliver it to the person for whom it is intended, that might bind them (*e*).

As respects the 4th section of the Statute of Frauds, the name of the party, and its application to the whole of the instrument, can alone satisfy the requisites of a signature. Therefore, if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it

(*d*) Per Coleridge, J., *Foster v. Mentor Insurance Company*, 3 Ell. & B. 48, 71.

(*e*) See *Hubert v. Turner*, 4 Scott, N. R. 486.

must have in order to comply with the statute, and to give authenticity to the whole of the instrument (*f*).

An acknowledgment in writing is required to be signed by the person making it (*g*); and therefore, although, in general, deeds do not require to be signed (*h*), yet, if an acknowledgment be made by a deed, the deed must be signed by the person making the acknowledgment.

By deed must be signed.

An implied acknowledgment by part payment of principal or interest stands on a different footing from the making of promises; for these are often rash or ill interpreted, while money is not paid without deliberation; and payment is an unequivocal act so little liable to misconstruction, as not to be open to the objection of an ordinary acknowledgment (*i*), is not an acknowledgment by words only but by conduct (*k*), is more conclusive than an acknowledgment either verbal or written, is evidence of the subsistence of a debt, and shows that the payee has a demand against the party who makes the payment (*l*). The thing done, and not the words used, constitute the acknowledgment (*m*). And such an acknowledgment may be proved by parol evidence (*n*).

Implied acknowledgments.

The part payment of a principal sum means, not the naked fact of payment of a sum of money (*o*), but payment of a smaller on account of a greater sum, due from the person making the payment to him to whom

What is part payment.

(*f*) *Caton v. Caton*, L. R., 2 E. & L. App. 127.

(*g*) 3 & 4 Will. 4, c. 27, ss. 14, 28, 40, 42; c. 42, s. 5.

(*h*) See *Queen v. Goddard*, 3 Salk. 171; *Cromwell v. Grimsden*, 2 Ib. 462; 1 Stra. 764; *Ex parte Hodgkinson*, 19 Ves. 296; *Taunton v. Pepler*, 6 Mad. 166; Com. Dig. Fait, B. 1; 3 Pres. Ab. 61; *Cherry v. Heming and Needham*, 19 L. J., N. S., Ex. 63, 4 Ex. Rep. 631, S. C. See also 4 T. R. 318; 2 M. & W. 111; *Cooch v.*

Goodman, 2 Gale & D. 159, 2 Q. B. 580, S. C.; *Aveline v. Whisson*, 4 Man. & G. 801.

(*i*) Per Tindal, C. J., *Wyatt v. Hodgson*, 8 Bing. 309, 312.

(*k*) 2 C., M. & R. 723; 1 Ex. 118; 6 Ib. 577, 579; 10 Ib. 840.

(*l*) 3 You. & Jer. 523; *Bamfield v. Tupper*, 7 Ex. 27.

(*m*) 6 Ex. 577, 579.

(*n*) *Cleave v. Jones*, 6 Ex. 573.

(*o*) See *Foster v. Dauber*, 6 Ex. 839.

it is made, and implies an admission of such greater sum being then due and a promise to pay it (*o*).

Need not be in money,

The part payment need not be in money, but may be without money having actually passed between the parties (*p*), and in a mode which the parties agree shall be treated as equivalent to a payment in money, as by a settlement of accounts (*q*). Therefore when two persons indebted to each other meet and agree to set off their respective debts, that is not a mere settlement of accounts, but is as much a payment as if money had passed between them (*r*), and such an account is a "part payment or part satisfaction" within the statute applicable to specialties (*s*).

—nor to the creditor himself.

So by agreement between parties the payment by the debtor of money owing by the creditor to a third person may be a mode of payment, either of interest, or, in part, of the principal to the creditor (*t*).

And may be constructive only.

The payment may be constructive only; as where a tenant for life of an estate subject to a charge is entitled to the interest of the charge, he will be deemed, both at law (*u*) and in equity (*x*), to have kept down and paid the interest, and thus preserve the right to the capital of the charge.

So the receipt of rents by an equitable mortgagee in possession may be taken, *prima facie*, as a payment

(*o*) *Waters v. Tompkins*, 2 C., M. & R. 728. See also *Cottam v. Partridge*, 4 M. & G. 271, 287.

(*p*) *Maber v. Maber*, L. R., 2 Ex. 153.

(*q*) *Forster v. Thompson*, 2 Con. & L. 568.

(*r*) *Ashby v. James*, 11 M. & W. 542; *Forster v. Thompson*, 2 Con. & L. 568; *Scholey v. Walton*, 12 M. & W. 510; *Walker v. Butler*, 6 E. & B. 506; *Holmes v. Mackrell*, 3 C. B., N. S. 789; *Bodger v. Arch*, 10 Ex. 833; *Amos v. Smith*, 1 H. & C. 238; *Manderston v. Robertson*, 4 Man. & Ry. 440.

(*s*) 3 & 4 Will. 4, c. 42; *Amos*

v. Smith, *supra*.

(*t*) 7 Q. B. 484.

(*u*) *Dillon v. Kennedy*, 1 Jebb & Sy. 579; *Cummins v. Finn*, stated in *Kirkwood v. Lloyd*, 12 Ir. E. R. 585, 591.

(*x*) See *O'Fallon v. Dillon*, 2 Sch. & L. 20; *Corbett v. Barker*, 1 Anstr. 138; 3 Ib. 755; *Reeves v. Hicks*, 2 Sim. & S. 403; *Raffety v. King*, 1 Keen, 601; *Burrell v. Lord Egremont*, 7 Beav. 205; *Kirkwood v. Lloyd*, 11 Ir. E. R. 561; 12 Ib. 585; *Hyde v. Dallanay*, 2 Hare, 528; *Burrows v. Gore*, 6 H. L. C. 907; *Binns v. Nichols*, L. R., 2 Eq. Ca. 266; 35 L. J., Eq. 685, S. C.



interest of the debt as the preserves the debt, ultra the value property, as against the general assets

agor (y).

section 40 of 3 & 4 Will. 4, c. 27, in terms, Is only one mode of acknowledgment. treats part payment as distinct from acknowledgment. In reality, however, payment is only a mode of acknowledgment (z), and in section 5 of c. 42 of the same session is so treated by the words, "such acknowledgment by writing, or part payment or part satisfaction as aforesaid" (a).

In cases within Lord Tenterden's Act (b), part payment was formerly held not proveable by a mere verbal acknowledgment, or by a mere settlement of accounts, but only by either evidence of the actual payment, or a writing such as the act requires (c). But an acknowledgment by payment is an acknowledgment by conduct and not by words only, and the effect and proof of payment since the 9 Geo. 4, c. 14, remains exactly as before (d); and therefore a written acknowledgment of payment unsigned or even a verbal one, or one made by the creditor himself before, but not after, the statute has operated (e), is sufficient evidence of the payment (f), although if such written and unsigned acknowledgment be a privileged communication it would be inadmissible (g). Evidence of.

(y) See *Brooklehurst v. Jessop*, 7 Sim. 438. On this case, see *Fordham v. Wallis*, 10 Hare, 217.

(z) 1 B. & Ald. 467; 3 Q. B. 576.

(a) See *Coope v. Cresswell*, L. R., 2 Eq. C. C. A. 112, 123.

(b) 9 Geo. 4, c. 14.

(c) *Willis v. Newham*, 3 You. & J. 519; *Waters v. Tompkins*, 2 C., M. & R. 723; *Bayley v. Ashton*, 1 Ad. & E. 493, 4 Per. & D. 204, S. C.; *Maghee v. O'Neil*,

7 M. & W. 531; *Baildon v. Walton*, 1 Ex. 617; *Jones v. Rider*, 4 M. & W. 82.

(d) *Cottam v. Partridge*, 4 Man. & G. 271, 287.

(e) *Briggs v. Wilson*, 17 Beav. 330; 5 De G., M. & G. 12, and cases cited.

(f) *Cleave v. Jones*, 6 Ex. 573; 12 Ad. & E. 494; *Bradley v. James*, 13 C. B. 822.

(g) *Cleave v. Jones*, 7 Ex. 412.

What acknowledgments under c. 27 must be express.

The acknowledgment of a title to land, or to rent (*d*), of the title of a mortgagor not in possession, or of his right of redemption (*e*), and of a right to arrears of rent, of interest of money charged upon or payable out of any land or rent, or in respect of any legacy, and of any damages in respect of such arrears of rent or of interest (*f*), must be in writing.

In *Stansfield v. Hobson* (*g*), Sir J. Romilly, M. R., said that the statute has only made a difference in this respect, that that which before the statute was a sufficient parol declaration must now be "in writing signed by the mortgagee or the person claiming through him."

An acknowledgment to a mortgagee of his title to land is to be by writing (*h*), or by part payment of the principal money or interest secured by the mortgage (*i*), and of his title to rent within the section 1 of the former statute, in writing (*k*), and of his right to the principal money in either mode (*l*).

What may be either express or implied.

The acknowledgment of a right to any money charged upon or payable out of any land or rent, or to any legacy (*m*), to any sum secured by specialty (*n*), may be either in writing, or by part payment of the principal money or some interest thereon; and to take a case out of the 3 & 4 Will. 4, c. 42, s. 5, there must be not merely a payment, but an acknowledgment by payment (*o*).

The acknowledgment of a right to the personal estate, or to any share of the personal estate, of any

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| (<i>d</i>) Sect. 14, 3 & 4 Will. 4, | <i>Bristow</i> , 8 Ex. 716; <i>Ford v. Agor</i> , 11 W. R. 1073. |
| (<i>e</i>) Sect. 28. <i>Ib</i> . | (<i>k</i>) <i>Ib.</i> , sect. 14. |
| (<i>f</i>) Sect. 42. | (<i>l</i>) 3 & 4 Will. 4, c. 27, s. 40. |
| (<i>g</i>) 16 Beav. 236, 237. | (<i>m</i>) <i>Ib</i> . |
| (<i>h</i>) 3 & 4 Will. 4, c. 27, s. 14; | (<i>n</i>) 3 & 4 Will. 4, c. 42, s. 5; |
| <i>Jayne v. Hughes</i> , 10 Ex. 430. | 16 & 17 Vict. c. 113 (1.). |
| (<i>i</i>) 1 Vict. c. 28; <i>Foreyth v.</i> | (<i>o</i>) Per Turner, L. J., <i>Whitley v. Lowe</i> , 2 De G. & J. 712. |

person dying intestate, may be either by accounting for or paying some part of such estate or share, or some interest in respect thereof, or in writing (*p*).

The consent or agreement which will deprive a person of the benefit of the 2 & 3 Will. 4, cc. 71, 100, where the right is in each case made absolute and indefeasible, is to be for the enjoyment of the right claimed, and expressly made or given for the purpose by deed or writing. If by deed it need not be signed (*q*); but if by a writing, not being a deed, it must be signed by the person against whom the claim is made or some one through whom he claims; and an answer to a bill in Chancery, signed and sworn, may be a sufficient consent under the latter statute (*r*).

Consent under 2 & 3 Will. 4, cc. 71, 100, how to be given.

SECTION II.

By whom Acknowledgments are to be made.

An acknowledgment in writing to take a claim out of Lord Tenterden's Act (*s*), or out of the Common Law Procedure Amendment Act (Ireland), 1853 (*t*), which adopts the terms of that act (*u*), must have been made by the debtor himself, and could not be made by an agent, but now may be made by an agent (*x*).

When by a debtor or his agent.

In other cases, however, an acknowledgment must be made by the person himself, and cannot be made by an agent; as to acknowledge the title of a person entitled to land or a rent by a person in possession, or in receipt of the profits, or of the rent (*y*); to

When by principal only.

(*p*) 23 & 24 Vict. c. 38, s. 13.

(*q*) See ante, p. 587.

(*r*) *Toymbee v. Brown*, 3 Ex. 117.

(*s*) 9 Geo. 4, c. 14; *Hyde v. Johnson*, 2 Bing. N. C. 776; *Clark v. Alexander*, 8 Scott, N. R. 147.

(*t*) 16 & 17 Vict. c. 113, s. 24.

(*u*) *In re Clendinning*, 9 Ir.

C. R. 284; *Cronin v. Dennyhy*, Ir. R., 3 C. L. 289.

(*x*) 19 & 20 Vict. c. 97, s. 13.

(*y*) 3 & 4 Will. 4, c. 27, s. 14;

11 Ir. L. R. 8; *Ley v. Peter*, 3 Ex., N. S. 101.

acknowledge the title of a mortgagor, or of his right of redemption, in land or in rent in the possession of a mortgagee, or who is in receipt of the profits of the land or in receipt of the rent (*y*). In these cases an acknowledgment by the agent of the person by whom it is to be given is not an acknowledgment by such person, as, under Lord Tenterden's Act, an acknowledgment to an agent is an acknowledgment to the principal (*z*). For in these cases the legislature, in this very statute, as in others (*a*), has given equal efficacy to written instruments when signed by the parties and when signed by their agents; but in all these cases express words are employed for the purpose, marking plainly the distinction between a signature by the party and a signature by his agent, and therefore must have intended such distinction as something more than mere form.

When by him
or his agent.

In other cases the acknowledgment may be made, either by the person himself, or by his agent; as in the case of the title of a mortgagee (*b*); in the case of money charged upon or payable out of any land or rent, at law or in equity; in the case of legacies (*c*); in the case of the personal estate, or any share of the personal estate, of any person dying intestate (*d*); in the case of arrears of rent, or of interest in respect of any such sum, or legacy, and damages in respect of such arrears (*e*); and in the case of debts by specialty (*f*).

Reason for
the difference.

In the sects. 14 and 28 of the 3 & 4 Will. 4, c. 27, the acknowledgment is the recognition of a title to land or rent itself, whilst in the sects. 41 and 42, and in the 23 & 24 Vict. c. 38, s. 13, the acknowledgment is the recognition of a right to property merely personal.

(*y*) 3 & 4 Will. 4, c. 27, s. 28;
Trulock v. Robey, 12 Sim. 402.

(*z*) *Fuller v. Rodman*, 26 Beav.
614.

(*a*) 29 Car. 2, c. 3, ss. 3, 4, 5,
17; 3 & 4 Will. 4, c. 42, s. 5; 3 &
4 Vict. c. 105, s. 34.

(*b*) 1 Vict. c. 28; *Chinnery v.*
Evans, 11 H. L. C. 115.

(*c*) 3 & 4 Will. 4, c. 27, s. 40.

(*d*) 23 & 24 Vict. c. 28, s. 13.

(*e*) Sect. 42.

(*f*) 3 & 4 Will. 4, c. 42, s. 5;
3 & 4 Vict. c. 105, s. 34.

Hence, probably, the difference between the former two sections of the former statute in requiring the acknowledgment to be made by the person to be affected by it, and the latter two sections and statute in permitting the acknowledgment to be made either by such person or by his agent.

The person to make and making the acknowledgment may be the only person who may hold the property claimed, or against whom, or against which, the claim is to be asserted, or one of several of such persons.

By one of several persons.

The person to make an acknowledgment of title to land or to rent under the sect. 14 of the 3 & 4 Will. 4, c. 27, is the person in the possession, or the receipt of the profits, of the land, or in receipt of the rent, and such person himself, and not his agent (*g*).

By the person himself under sect. 14 of c. 27.

Even under this section, however, the acknowledgment may be signed by a third person, for and at the request, and in the presence of, the person by whom that provision requires the acknowledgment to be given, and who from illness may be unable to write (*h*). In such a case the signature is to be considered as that of the person to give the acknowledgment (*i*).

When his signature may be by another.

In *Hyde v. Johnson*, however, a letter written by the wife of a debtor, in his name, at his request, and sent by him to the creditor, was held not to be a writing "signed by the party chargeable thereby" under Lord Tenterden's Act (*k*). And the terms of this act having been adopted in the Common Law Procedure Amendment Act (Ireland), 1853, as just observed, a similar decision was made in a case depending on this latter act (*l*). In that case, an affidavit, signed with the

(*g*) 11 Ir. L. R. 8; *Ley v. Peter*, 3 Ex., N. S. 101.

(*h*) *Lessee of the Corporation of Dublin v. Judge*, 11 Ir. L. R. 8. See also *Hyde v. Johnson*, *supra*.

(*i*) *Ley v. Peter*, 3 Ex., N. S.

L.

101. See also *Ball v. Dunster-ville*, 4 T. R. 313.

(*k*) 9 Geo. 4, c. 14; 2 Bing. N. C. 776; 3 Scott, 289. See also *Pott v. Clegg*, 16 M. & W. 321.

(*l*) *In re Clondinning*, 9 Ir. C. R. 284.

mark of the deponent when in such a state of disease as to be unable either to read the affidavit or to attach his signature to it, and as to render necessary the reading of it to him by a third person, was held not to be his act, but the act of the person who prepared it.

There is a substantial difference between the case *Lessee of the Corporation of Dublin v. Judge* and the case of *Hyde v. Johnson*. In the former, the signature was in reality that of the person to give it; in the latter, the writing was by a third person in her own name (*m*). But between the former of these two cases and the case *Re Clendinning* the difference is very slight. In the latter case, and also in *Hyde v. Johnson*, the acknowledgment was to create a personal liability, whilst an acknowledgment under the sect. 14 and the sect. 40 (*n*) of the 3 & 4 Will. 4, c. 27, creates and requires no such liability, but merely recognizes the title of a person out of possession.

By mortgagee
under sect. 28.

The person to make, under sect. 28, an acknowledgment of the title of a mortgagor not in possession of the land, or in the receipt of the profits of it, or in receipt of the rent comprised in the mortgage, but in the possession or in the receipt of the mortgagee, is, as under the sect. 14, the mortgagee himself, and not his agent (*o*).

Whether by
a receiver
under those
sections.

Whether an acknowledgment under those sections 14 and 28 by a receiver, appointed by a court of competent jurisdiction, of the estates of the person to make the acknowledgment would be sufficient, may be a question. For the purpose of making an acknowledgment, either by payment or by writing, under the sect. 42 (*p*), and also for the like purpose under the section 40 of the same statute (*q*), such a receiver is the agent

(*m*) See *Helshaw v. Langley*, 11 L. J., N. S., Eq. 17; *Loy v. Peter*, 8 Ex., N. S. 101.

(*n*) See *Toft v. Stephenson*, 1 De G., M. & G. 41.

(*o*) Sect. 28, 3 & 4 Will. 4,

c. 27; *Trulock v. Robey*, 12 Sim. 402.

(*p*) *Chinnory v. Evans*, 11 H. L. C. 115.

(*q*) See *Cronin v. Donnelly*, L. R., 3 C. L. 289.

of the person liable within those sections. His acknowledgment would be also that of the mortgagor within the 1 Vict. c. 28(*r*). The latter statute, however, is altogether silent as to the person by whom the acknowledgment is to be made; and therefore the general rule, *qui facit per alium facit per se(s)*, would apply. But the acknowledgment under the section 14 is to be given by the person himself in possession, or in receipt of the profits, of the land, or in receipt of the rent; and that under the section 28 by the mortgagee himself, or by the person himself claiming through him. Each of these sections, whilst expressing how and by whom an acknowledgment is to be given, is silent as to an acknowledgment being made by an agent. Other sections of the same statute in terms admit such an acknowledgment. But this distinction cannot be regarded as merely formal. To neglect it would be legislating, not interpreting(*t*). The sufficiency, therefore, of an acknowledgment under these two sections by such a receiver could only be maintained on the ground of being by the person himself to make it under them(*u*); and unless capable of being so considered would be of no avail(*v*).

The person to make an acknowledgment of the right to any sum of money charged upon or payable out of any land, or any rent, or to any legacy, under the sect. 40 of the 3 & 4 Will. 4, c. 27, is the person by whom the same is payable, or his agent; and such person means a party liable in respect of his interest in(*x*), or some person connected with(*y*), the land.

In the case of a claim by way of equitable lien, such

By person to pay or his agent, under sect. 40.

In the case

(*r*) *Chinnery v. Evans*, supra.

(*s*) Vide post, Sect. IV.

(*t*) Supra, p. 592; *Hyde v. Johnson*, supra.

(*u*) See *Cronin v. Dennehy*, supra; post, Sect. IV.

(*v*) *Hyde v. Johnson*, supra.

(*x*) *Elvy v. Norwood*, 5 De G. & S. 240.

(*y*) *Roddam v. Morley*, 2 K. & J. 345.

of an equitable
lien,

person is the person entitled to the land on which the charge is sought to be fixed. The money is payable by him in the only sense in which it is payable by any one. Unless he pays it he will lose his land, and it is obviously in that sense that the statute in such a case speaks of the money as payable. A pre-personal liability is not necessary (r).

—or a conveyance for
indemnity.

If a conveyance be made of lands upon trusts for indemnifying other lands sold by the grantor from incumbrances thereon, but not affecting the indemnity lands, the duty of the beneficial owner of the lands subject to the indemnity trusts is to pay the interest, as well as the principal, of such incumbrances; and payments of interest by him will prevent, as respects the lands sold, the operation of the sect. 40 upon the principal of the charge (s).

By whom for
share of intestate's estate.

The person to make an acknowledgment of the right to the personal estate or any share of the personal estate of an intestate, possessed by the legal personal representative of such intestate, under the 23 & 24 Vict. c. 38, s. 13, is the person accountable for the same, or his agent.

Acknowledgment may be
an implied
one.

An acknowledgment by payment, as well as by writing, under the sect. 40 of the 3 & 4 Will. 4, c. 27, may be made by an agent of the person liable, as well as by such person himself (t). This section is silent as to the person by whom an acknowledgment by payment is to be made (u), and is confined to cases of recovery of money. The 1 Vict. c. 28, preserves, by payment of principal or interest, the right of a mortgagee to recover the land (x), and is silent as to the person to make the payment; but to both provisions

(r) *Tuft v. Stephenson*, 1 De G., M. & G. 41. See also *Bolding v. Lane*, 1 De G., J. & S. 122.

(s) *Homan v. Andrews*, 1 Ir. Ch. R. 106.

(t) *Vincent v. Wellington*,

Longf. & T. 456; *Chinnery v. Evans*, 11 H. L. C. 115.

(u) 4 Ir. C. L. R. 614.

(x) *Ford v. Ager*, 11 W. R. 1078.

the same principle of interpretation, and the same *ratio decidendi*, are applicable (*y*).

The person to make an acknowledgment of the right to arrears of rent, or of interest in respect of any sum charged upon or payable out of any land or rent, to any legacy, or to damages in respect of such arrears, under the sect. 42 of the 3 & 4 Will. 4, c. 27, is the person by whom the same is payable, or his agent. By whom
under sect. 42.

The words "the person by whom the same is payable," in the sect. 42 of the 3 & 4 Will. 4, c. 27, are of such large import and meaning that they would comprehend, not only a mortgagor and his representatives, upon whom the contract would be personally binding, but would also include a second or a third mortgagee, by whom the principal and interest due to the first mortgagee might with propriety be said to be payable, inasmuch as the estate and right of the second mortgagee is subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgagee upon the payment of the principal and interest (*z*). They do not mean merely the person who is liable at law to pay the interest under the contract, that is, the mortgagor or his representatives, and not including a second mortgagee, as held by Stuart, V.-C. (*a*), but all the persons against whom the payment of such arrears may be enforced by any action or suit, and by whom, therefore, as they have a right to pay such interest in redemption of their land, interest may be properly said to be payable. If a legacy is by will charged upon land, which is then specifically devised, the devisee is not liable by any contract to pay the legacy or the interest thereon; but he is, nevertheless, a person by whom such legacy and interest are payable, for he is entitled to redeem the lands devised

(*y*) *Chinnery v. Evans*, 11 H. L. C. 115.

(*a*) *Bolding v. Lane*, 3 Giff. 561.

(*z*) 11 H. L. C. 135.

to him. In truth, these words of the statute appear to have been selected as a description capable of including not only every person liable to be sued at law, but every person who, having an interest in the land sought to be charged, might be properly sued as a defendant in a suit in equity, brought to enforce payment of the principal and interest out of such land. The intention of the enactment is, that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands, without an acknowledgment in writing, signed by such person, or by some former owner from whom the interest is derived; and, therefore, the effect of an acknowledgment under this enactment is confined to the interest of the person making such acknowledgment (*b*), whilst, as we have just seen, an acknowledgment under the sect. 40 may affect other persons besides the person making it.

Personal liability unnecessary.

Not to be made by a stranger.

The person making the acknowledgment need not be a person who is personally liable to the charge (*c*).

An acknowledgment under the sects. 28, 40 and 42 of the 3 & 4 Will. 4, c. 27, when made by a mere stranger, has no efficacy (*d*); for, as Lord Cranworth, C., said (*e*), with reference to chapter 42 of the same session, sect. 5, *in pari materia*, it would be absurd to suppose that the legislature meant to give any right against the debtor by the act of a mere stranger.

Whether by a person under disability.

The disability of a person against whom a claim exists does not relieve the claimant from asserting his claim within the prescribed period of limitation (*f*). But whether an acknowledgment made under the sects.

(*b*) *Bolding v. Lane*, 1 De G., J. & S. 122; 11 H. L. C. 185.

(*c*) *Lord St. John v. Boughton*, 9 Sim. 129; *Toft v. Stephenson*, 1 De G., M. & G. 28; *Bolding v. Lane*, 1 De G., J. & S. 122; *Roddam v. Morley*, 1 De

G. & J. 1.

(*d*) *Homan v. Andrews*, 1 Ir. Ch. Rep. 106; *Chinnery v. Evans*, 11 H. L. C. 115.

(*e*) *Roddam v. Morley*, 1 De G. & J. 1, 18. See also post, p. 600.

(*f*) Vide ante, pp. 561, 562.

14, 28, 40 and 42 of the 3 & 4 Will. 4, c. 27, and the sect. 13 of the 23 & 24 Vict. c. 38, by the person to make it under those sections respectively, when such person is under any disability, would be valid, is at least doubtful. The chapter 42 of the same session warrants the inference that such an acknowledgment would be valid; for by the sect. 3 of the latter chapter, claims by specialty are to be asserted within twenty years after the cause of action, but not after, or within twenty years after an acknowledgment made; or if the person making the acknowledgment be, at the making, beyond the seas, then within twenty years from the return of such person (*g*). Hence, the inference on this statute, *in pari materia* with chap. 27, is, that any other disability of the person liable will not prevent an acknowledgment by him having the same effect as if he were not under such other disability.

The person to make an acknowledgment of any debt by indenture, bond, or other specialty, or any recognizance, under the sect. 5 of 3 & 4 Will. 4, c. 42, and the 3 & 4 Vict. c. 105, s. 34, is "the person liable by virtue of such indenture, bond or other specialty, or such recognizance, or his agent."

By specialty
debtor or his
agent.

In *Roddam v. Morley* (*h*), it was observed, that the framers of the act had in their mind the single case of a sole obligor, and that the case of a bond with several obligors, or of a deceased obligor, never occurred to them. If so, then the party liable, or his agent, within these sections, so far as the intention of the legislature is concerned, must mean the individual making the acknowledgment (*i*).

In some instances the enactments, admitting an acknowledgment by payment, do not express by whom

In case of
implied ac-
knowledgegment

(*g*) Sect. 5.

(*h*) 1 De G. & J. 1.

(*i*) Per Lord Chelmsford, C.,

Coops v. Crosswell, 2 L. R., C. A.
124.

where statute
is silent.

9 Geo. 4, c. 14.

3 & 4 Will. 4,
c. 42, &c.

By one or
more of
several persons
liable.

such an acknowledgment is to be made, and hence the question who is the person to make it.

Thus, the proviso in Lord Tenterden's Act (*k*), that "nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever;" that is, said Tindal, C. J. (*l*), not confining the effect of payment to the individual paying, but of any payment made by the principal debtor, or any one acting by his authority; that, however, never can mean a payment made by a stranger, and without authority (*m*). But the payment may be by and to one and the same person; that is, by him for, or as the agent of, the debtor and to himself as the creditor (*n*).

Neither the sect. 5 of the 3 & 4 Will. 4, c. 42 (*o*), nor the 1 Vict. c. 28 (*p*), nor the sect. 34 of the 3 & 4 Vict. c. 105, express by whom an acknowledgment by payment is to be made. It can hardly be doubted, however, that as well under the chap. 42 as under the 3 & 4 Will. 4, c. 27, s. 40 (*q*), and the 3 & 4 Vict. c. 105, the statutes imply that such an acknowledgment shall be made by the same person as is to make an acknowledgment in writing. There can be no doubt it must be made by a party interested, and not by a mere stranger (*r*).

The person or persons making an acknowledgment may be one or more of several persons, being under a joint, or a joint and several, or a common, liability in respect of the claim, or claiming under a common title, and then arises the question what is the effect of such

(*k*) 9 Geo. 1, c. 14, s. 1.

(*l*) *Wyatt v. Hodson*, 8 Bing. 309, 312.

(*m*) *Linsell v. Bonsor*, 2 Bing. N. C. 241.

(*n*) See *Brookhurst v. Jessop*, 7 Sim. 499. On this case, see *Fordham v. Wallis*, 10 Hare, 217.

(*o*) *Roddam v. Morley*, 1 De G. & J. 1, 18.

(*p*) See *Forsyth v. Bristowe*, 8 Ex. 722; *Chinnery v. Evans*, 11 H. L. C. 115.

(*q*) *Chinnery v. Evans*, *supra*.

(*r*) *Roddam v. Morley*, 1 De G. & J. 1, 6, 18; *Coops v. Creswell*, L. R., 2 Eq. Ca., C. A. 112.

an acknowledgment with reference to the other person or persons so liable, or so claiming.

The court said, in *Kirkwood v. Lloyd* (s), that the authorities in England establish that the acknowledgment, to affect another person than the person giving it, must be by a person expressly or impliedly authorized to make it on behalf of the person sought to be affected by it; but that those in Ireland establish that the acknowledgment will bind every other person liable whether standing in privity or not (t). In *Kirkwood v. Lloyd* is shown when an acknowledgment by one person will not affect another, and all the distinctions as to privies are noticed. The acknowledgment in *Warrens v. O'Shea* was by a principal debtor, and was held to bind the personal representatives of a surety, although made after the death of the surety.

Principal and surety.

In England, down to nearly the end of the reign of George the Fourth, and in Ireland, down to the middle of the present reign, where two or more persons were jointly, or jointly and severally, liable on a simple contract and independent of partnership (u), although the principle seems applicable equally to joint contractors who are, as to those who are not, partners (x), an acknowledgment by one or more of such persons during the existence of the joint liability, even after the expiration of the period of limitation (y), would prevent the operation of the Statute of Limitations as against the other or others (z), but made after the joint liability had determined, would not prevent the operation of the statute against the other or others (a), for on such de-

Joint-contractors or co-debtors.

(s) 11 Ir. Eq. R. 561.

(t) *Warrens v. O'Shea*, stated 11 Ir. Eq. R. 576.

(u) See *Fordham v. Wallis*, 10 Hare, 217.

(x) See *Clark v. Alexander*, 8 Scott, N. R. 147.

(y) *Perham v. Raynal*, 2 Bing. 306.

(z) *Whitcomb v. Whiting*, 2 Doug. 652; *Burleigh v. Stott*, 8 B. & C. 36.

(a) *Atkins v. Tredgold*, 2 B. & C. 28; *Slater v. Lamson*, 1 B. & Ad. 396; *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Hare, 217; *Brandram v. Wharton*, 1 B. & Ald. 463; *Way*

termination the original joint liability becomes the several one of the parties to it (*b*); and these cases are not affected by the peculiar considerations arising out of the relation and authority of partners (*c*).

This principle is founded in justice. Apart from purely legal considerations, it cannot be doubted, that it ought not to be in the power of any person, by his admission, to revive a right against another, which, but for that admission, would have been wholly extinguished (*d*).

This principle is applicable, independently of the relative liability of real and of personal estate to the claim; for the existence, or non-existence of the demand, depends upon the act of the person, and not upon that relative liability (*e*).

In the former reign, as to England (*f*), and in the latter reign, as to Ireland (*g*), the legislature enacted that two or more joint contractors, or executors or administrators of any contractor, should not be made liable by only an acknowledgment or promise in writing made by one or more of the others, but left the effect of an acknowledgment by payment untouched, and therefore such an acknowledgment by one of several joint contractors during the joint liability was the acknowledgment of all (*h*); although made after the period of limitation had expired (*i*), but not after the joint liability had ceased (*k*).

Again in the present reign, and both as to England and Ireland, the legislature enacted that two or more co-contractors or co-debtors, or executors or administrators

v. Bassett, 5 Hare, 55; *Davies v. Edwards*, 7 Ex. 22.

(*b*) *Atkins v. Tredgold*, *supra*.

(*c*) *Fordham v. Wallis*, 10 Hare, 217.

(*d*) 10 Hare, 228.

(*e*) *Ib.*

(*f*) 9 Geo. 4, c. 14, s. 1.

(*g*) 16 & 17 Vict. c. 118, s. 24.

(*h*) *Manderston v. Robertson*,

4 Man. & Ry. 440; *Channel v. Ditchburn*, 5 M. & W. 494; *Goddard v. Ingram*, 3 Q. B. 839; *Wyatt v. Hodson*, 8 Bing. 309. See also *Clark v. Alexander*, 8 Scott, N. R. 147.

(*i*) *Manderston v. Robertson*, *Channel v. Ditchburn*, *supra*.

(*k*) *Davies v. Edwards*, 7 Ex. 22.

of any contractor shall not lose the benefit of the former Statutes of Limitation (*l*), by reason only of part payment by the other or others (*m*).

Therefore neither an acknowledgment in writing, nor one by part payment, made by one or more of several joint contractors or co-debtors, liable either jointly, or jointly and severally, or of several executors or administrators, can now affect any of the others (*n*).

Where, however, a right exists to or against real estate claimed by several persons under a common title jointly, or in common, or for different interests, an admission by some of them, as regards the right against the estate, before that right has been extinguished, may affect the shares or interests of the other or others.

One or more of several persons claiming under a common title.

As to the title to land and rent under the section 14, and as to the right to charges thereon under the section 40, and to arrears of rent and of interest for such charges under the section 42, an acknowledgment made by one of several persons who are coparceners, joint tenants or tenants in common, will not affect the others; for by the section 12 the privity of possession existing between persons standing in those several relations before that enactment (*o*) is now taken away, and each of them has a separate and distinct possession.

Coparceners and others.

An acknowledgment by one of several mortgagors in possession will bind the others. This proposition may be inferred from the section 28; for that enactment expressly excludes the effect of an acknowledgment by one of several mortgagees, upon the others, and at the same time gives to all of several mortgagors the benefit of an acknowledgment to one only. Therefore as the statute is silent as to acknowledgments by one of several

Mortgagors.

(*l*) 21 Jac. 1, c. 16, s. 8; 8 & 4 Will. 4, c. 42, s. 8, as to specialty debts; 16 & 17 Vict. c. 118, s. 20 (*l*.), by reason only of part payment by the other or others.

(*m*) 19 & 20 Vict. c. 97, s. 14.

(*n*) See *Cockrill v. Sparkes*, 1 H. & C. 699.

(*o*) See Co. Litt. 169 a.

mortgagors, the intention of the legislature would seem to be that the acknowledgment by one of several mortgagors should bind all. *Expressio unius exclusio alterius*. The 1st Vict. c. 28 is silent as to who is to make an acknowledgment under it of the title of the mortgagee, and if the statute implies that it may be made by the party liable or his agent, the assignee of the equity of redemption who covenants to pay the mortgage money and interest, or, in equity, who enters into no express covenant to pay (*p*), is an agent for the purpose (*q*), and the acknowledgment, if made by a tenant for life of the equity of redemption, and before, but not after, the expiration of the period of limitation, will bind the remainderman (*r*).

Mortgagees.

An acknowledgment by one or more of several mortgagees in the possession or the receipt of the profits of the land, or the receipt of the rent, affects only the person or persons making the acknowledgment (*s*); and, if made by a person entitled for life under the mortgage, and before, but not after, the period of limitation fixed by this section has expired, will bind the persons entitled in remainder under the mortgage (*t*).

Owners of divers lands subject to a common charge,

Where divers lands are subject to one common charge, as a fee farm rent (*u*), a judgment (*x*), or a mortgage (*y*), the acknowledgment by any one of several owners of separate and distinct parts of such lands, or by his agent, will preserve the charge against all who are entitled to the other parts of them originally subject to the charge, and not released or given up by

(*p*) See Lord Eldon's judgment in *Waring v. Ward*, 7 Ves. 337.

(*q*) *Forsyth v. Bristowe*, 8 Ex. 716.

(*r*) *Gregson v. Hindley*, 10 Jur. 383.

(*s*) 3 & 4 Will. 4, c. 27, s. 28.

(*t*) *Gregson v. Hindley*, 10 Jur. 383.

(*u*) *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. R. 265; *Warren v. Bateman*, Flan. & K. 454.

(*x*) *Kirkwood v. Lloyd*, 11 Ir. Eq. R. 561; 12 Ib. 585; *Morris v. Herbert*, 9 Ir. C. R. 327.

(*y*) *Chinnery v. Evans*, 11 H. L. C. 115.

the owners of the charge, so long as the charge itself is subsisting (z).

In *Dickinson v. Teasdale* (a), Sir John Romilly, M. R., seems to have considered that in the case of a general charge of debts on real estate, and a devise of a part of the estate to one person, and of the other part to another, an acknowledgment by one devisee would not affect the other, because there is no privity; and he said, if a testator charge his estate with a sum of money, and devise the estate to four different devisees, and one of them think fit to pay the interest on the charge, it will bind him, but not the others. In the subsequent case of *Chinnery v. Evans* (b), however, where, as in the case supposed, there was one mortgage of several estates, the payment of interest by the agent of the owner of one of the estates was held to preserve the mortgage as against the owners of the other estates.

But where lands are subject to separate charges,—and a moiety of an entire charge may be a separate charge,—such an acknowledgment by the owner of one part of the lands will not preserve the charge as against the owner of the other part of them.

Thus, where a testator creates in moieties a charge upon his real estate, and imposes one moiety of the charge upon one part of the estate devised to one person, and the other moiety of the charge upon the other part of the estate devised to another person, the acknowledgment by one devisee will not keep alive the charge as against the other, for there is no privity between them (c).

One of two joint beneficial owners of lands, subject to trusts for indemnifying other lands from charges thereon, has implied authority to make an acknowledg-

— separate charges.

One of two joint beneficial owners.

(z) See also *Homan v. Andrews*, 1 Ir. Ch. Rep. 106.

(a) 81 Beav. 511, 519, 520.

(b) Supra.

(c) *Dickinson v. Teasdale*, 81 Beav. 511; affirmed on appeal, 1 De G., J. & S. 52.

ment of such charges, and such acknowledgment will bind the persons entitled to the lands originally charged (*d*).

But where one of such joint beneficial owners is not liable, and the indemnity lands are not liable to a common charge, the only ground on which such a payment of interest, if made in proper time, can affect the owner of the purchased lands is, that he, the joint beneficial owner of the indemnity lands, is to be considered as the agent of the owner of the purchased lands, if the effect of the act of payment of principal or interest be to indemnify and exonerate those lands (*e*).

One of two
conusors of
a judgment.

An acknowledgment by one of two conusors of a judgment, who has conveyed his estates to trustees for the benefit of his creditors, may be taken either as by himself, or as the agent of the trustees, and binds the other conusor (*f*).

By a trustee
for sale binds
the *cestui
que trust*.

An acknowledgment by a trustee in trust to sell and pay debts (*g*), and as well when appointed by the Court of Chancery in the place of an original trustee, as when appointed by the creator of the trust himself (*h*), will bind the *cestui que trust*. But if the trustee be also executor (*i*), or administrator (*k*), it may not bind the *cestui que trust*; and made by him in his character of personal representative, will not affect a devisee of real estate (*l*).

By executor,
whom it binds
and does not
bind.

So an acknowledgment by an executor in an ordinary case (*m*) will preserve a claim as against all parties beneficially interested in the personal estate, but not against the heir to, or the devisee of, real estate (*n*).

(*d*) *Homan v. Andrews*, 1 Ir. Ch. Rep. 106.

(*e*) *Ib.*

(*f*) *Vincent v. Wellington*, Longf. & T. 456.

(*g*) *Lord St. John v. Boughton*, 9 Sim. 219.

(*h*) *Toft v. Stephenson*, 1 De G., M. & G. 28.

(*i*) *Fordham v. Wallis*, 10 Hare, 217.

(*k*) *Coope v. Cresswell*, L. R., 2 Eq. C. C. A. 112.

(*l*) *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, *supra*.

(*m*) 1 De G., M. & G. 41.

(*n*) *Putnam v. Bates*, *Fordham v. Wallis*, *Coope v. Cresswell*, *supra*.

One of several executors or administrators who are in the possession, or the receipt of the profits, of chattels real, or in the receipt of a rent of that nature, or who are entitled to such chattels subject to a charge thereon, may happen to give an acknowledgment of the title to such chattels under either the section 14, or the section 28 of the 3 & 4 Will. 4, c. 27, of such chattels, or under the section 40 to such charge thereon, and the question will then be whether and how far the others are or may be affected by such acknowledgment.

By one of several executors or administrators, its effect.

Co-executors, however numerous, are regarded, in law, as an individual person; and, by consequence, the acts of any one of them in respect of the administration of the effects, are deemed to be the acts of all (*o*). Thus, the release of a debt (*p*), the settlement of an account (*q*), which, being evidence of payment, must be by him in his representative capacity (*r*), the assent to a legacy (*s*), the attornment (*t*), the grant or surrender of a term (*u*), by one of several executors will bind all, for they all have a joint and entire authority over the whole property (*x*); but as an assignment of a mere *chose en action* gives no legal advantage, and is operative in equity only, a court of equity will not act upon such assignment, and interfere to give the particular creditor an advantage against the other executors and the general creditors (*y*).

How co-executors are regarded, and the power of each.

On the same principle an acknowledgment by one of several executors or administrators of the title to chat-

(*o*) Touch. 484; *Ex parte Rigby*, 19 Ves. 462.

(*p*) *Jacomb v. Harwood*, 2 Ves. Sen. 267; *Herbert v. Pigott*, 4 Tyrw. 285.

(*q*) *Smith v. Everett*, 27 Beav. 446.

(*r*) *Scholey v. Walton*, 12 M. & W. 510.

(*s*) Com. Dig. Administration (c. 8); *Cole v. Miles*, 10 Hare, 179.

(*t*) Dy. 23 b. in marg.; 1 Mad. 616.

(*u*) *Simpson v. Gutteridge*, 1 Mad. 616. See also *Turner v. Hardey*, 9 M. & W. 770.

(*x*) 1 Roll. Ab. 924; Exors. (O.), Com. Dig. Administration (B. 12); *Owen v. Owen*, 1 Atk. 495.

(*y*) *Lepard v. Vernon*, 2 Ves. & B. 51.

tels real under the section 14, and of the right to a charge thereon under the section 40, will bind the other.

An acknowledgment under the section 28 by one of several executors in possession as mortgagees but in only their representative character, will bind all. Under that section indeed, in the case of more than one mortgagee, and of an acknowledgment by one or more short of all, the acknowledgment binds only the person or persons making it, and not the person or persons entitled to any other undivided or divided part of the money, or land, or rent. But this is to be understood where the mortgagees claim several and distinct interests, and not where they claim in a representative character and collectively as, in fact, one mortgagee, where there are several executors or administrators.

When liable
in that character
personally only.

But one of several executors or administrators, who in that character are liable to a charge, apart from the land or rent, or to a legacy, under the section 40, or to arrears, under the section 42, may also happen to give an acknowledgment of the right to such charge, legacy, or arrears, and the question will then be whether and how far the others are or may be personally liable to such charge, legacy, or arrears.

Though one executor may dispose of the assets of the testator so as to bind the others, they cannot severally make a new contract so as to bind each other (*z*), or create a new liability and impose a charge on the others personally and in their own individual character, which, without such act, would never have existed (*a*), as in taking possession of a chattel real or personal (*b*), or by a *devastavit* (*c*); and one executor is not the

(*z*) Per Lord Abinger, *Turner v. Hardey*, 9 M. & W. 770, 778.

(*a*) *Nation v. Tozer*, 4 Tyrw. 561.

(*b*) *Ib.*

(*c*) *Hargthorpe v. Milforth*, Cro. El. 818; *Williams v. Nixon*, 2 Beav. 472; *Williams' Exors.*, pt. 4, bk. 2, ch. 2, s. 2.

agent of another to bind him by contract (*d*). The same principle extends to one of several administrators (*e*).

In this respect no distinction between express or written acknowledgments, and acknowledgments implied, as by payment, exists, although sometimes suggested. The effect of the former kind of acknowledgment sometimes may differ from the effect of the other kind. The effect of the former kind is confined to the person making it (*f*), but the latter kind, as relieving, *pro tanto*, from the common liability, is a benefit to all the persons liable. This distinction may possibly account for the difference in the language of the 3 & 4 Will. 4, c. 42, s. 5, between acknowledgments in writing and by part payment, which, as to the person making them, seem intended to be placed on the same footing, payment being treated as one species of acknowledgment (*g*).

Whether the acknowledgment be express or only implied.

An express acknowledgment by one of several executors has been held not to deprive the others of the benefit of the Statute of Limitations (*h*). Of this decision, Parke, B., said, "it appears to me that that case is founded in justice and good sense, and ought to be followed" (*i*). If made by a sole executor, it will take a case out of the statute (*k*).

Express by one does not deprive the others of the benefit of the statute.

Whether an implied acknowledgment by payment by one executor will deprive the others of the benefit of the statute was noticed in, but not decided by, the cases of *Atkins v. Tredgold* (*l*), and *M'Culloch v.*

Whether when implied only.

(*d*) Per Parke, B., *Turner v. Hardey*, *supra*.

(*e*) 2 Ves. sen. 267; Touch. 485, 486; *Smith v. Ecorrett*, 27 Beav. 454.

(*f*) See *Bolding v. Lane*, 1 De G., J. & S. 122.

(*g*) *Coope v. Cresswell*, L. R., 2 Eq. C., C. A. 112, 123.

(*h*) 9 Geo. 4, c. 14; *Tullock v. Dunn*, 1 Ry. & M. 416.

(*i*) *Scholey v. Walton*, 12 M. & W. 510.

(*k*) *Smith v. Poole*, 12 Sim. 17. See also *Briggs v. Wilson*, 5 De G., M. & G. 12.

(*l*) 2 B. & C. 23.

Dawes (m). The question arose in, but was not decided by, *Scholey v. Walton (n)*. Lord Abinger there said, probably one executor may by his acts bind another, but he must do the act *as an executor*. Parke, B., in the same case, seemed to think the act should also be with the intention of binding the assets of the testator. The payment was held to have been made by the executor, not *quâ* executor, but in his own right (*o*). On principle the two kinds of acknowledgment, with reference to this question, appear to be undistinguishable, and the same effect ought to be given to one as to the other.

By one of
several
partners ;

An acknowledgment therefore by one of several executors or administrators of a charge under the section 40, or of arrears under the section 42, so as to create any personal liability thereto in that character apart from the land, or to a legacy under the former section (*p*), will not affect the others.

—a surety ;

One of several partners may take out of the Statute of Limitations, by an acknowledgment, a claim in relation to the property, or a liability of the partnership as against the other partners (*q*).

The payment of interest by a surety in a bond given as a collateral security for a sum of money primarily secured by a mortgage of a reversionary legacy charged on land, and payable on the death of the surety, will preserve the right of the mortgagee to the benefit of the legacy so assigned, although his right to the mortgage debt may be barred (*r*).

—a mortgagor
as against and
between mort-
gagees.

As between a mortgagor and first and second mortgagees, an acknowledgment by the mortgagor to the first mortgagee affects the mortgagor only, and will

(*m*) 9 Dow. & R. 40.

(*n*) 12 M. & W. 510.

(*o*) See also *Bassett v. Way*,
5 Hare, 55.

(*p*) See *Holland v. Clark*, 1
You. & C. C. C. 151.

(*q*) See *Perry v. Jackson*, 4 T.
R. 516, 519; *Clark v. Alexander*,
8 Scott, N. R. 147.

(*r*) *Seager v. Aston*, 3 Jur.,
N. S. 484; 26 L. J., N. S., Ch. 809.

not affect the second mortgagee so as to enable the first mortgagee to claim from the estate, as against the second mortgagee, more than six years' arrears of interest on his security (*s*).

Where a right exists to or against real estate claimed by several persons who are entitled to different interests, or some of whom, in addition to being beneficial owners, may also fill other wholly different characters, and the rights and liabilities incident to those characters may be in law wholly different (*t*), an acknowledgment by one person so entitled may bind the others, or by one and the same person filling different characters may bind him either in both, or in only one of such characters.

By one of several persons having different interests, or one person filling two characters.

A tenant for life and a tenant in remainder are privies in estate; and as in the case of a release (*u*), so in the case of acknowledgment, when made by the former before, but not after, the expiration of the period of limitation, will bind the latter (*x*).

Tenant for life;

In *Fordham v. Wallis* (*y*), Turner, V.-C., said, it may occasion great inconvenience if payment of interest by a tenant for life of land charged with a principal debt is not to bind the remainderman from setting up the statute, because the creditor may receive interest for twenty years, and then lose the principal, because he has not sued within six years. In *Coope v. Cresswell*, Lord Chelmsford, C., said, that in the case of a charge on land the tenant for life and the remainderman of the land are so united in interest that the payment by the one might be regarded as an acknowledgment of the charge by the other.

—charges on land.

Where a settlement recites the existence of prior

(*s*) *Bolding v. Lane*, 1 De G., J. & S. 122; 11 H. L. C. 135.

(*u*) Co. Litt. 267 b.

(*t*) See *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Hare, 217.

(*w*) *Gregson v. Hindley*, 10 Jur. 883.

(*y*) 17 Jur. 228, 229; 10 Hare, 217.

incumbrances, and the settlor cuts down his estate, which is subject to the prior incumbrances, to an estate for life, an acknowledgment signed by him, after he has become tenant for life, is an acknowledgment signed by the person by whom the interest is payable within the meaning of the section 42 of the 3 & 4 Will. 4, c. 27; for although a sum of money secured by a bond is not a sum of money payable out of land within the meaning of the 3 & 4 Will. 4, c. 27 (z), yet as a payment or acknowledgment by a tenant for life of lands devised by the obligor in a bond, after the date of the bond, is binding on a remainderman under the statute of the 3 & 4 Will. 4, c. 42 (a), there is no substantial difference between that case and a payment or acknowledgment by a tenant for life under the 3 & 4 Will. 4, c. 27. It may no doubt be argued that there is a distinction between a payment by a tenant for life, who thereby performs the duty of keeping down the interest, and an acknowledgment in writing as to interest being due, which is not in accordance with his duty as tenant for life; but it is to be observed that the express language of the 3 & 4 Will. 4, c. 42, places acknowledgments by writing, and acknowledgments by payment, on exactly the same footing. The two statutes are *in pari materia*, and the language in both, with reference to acknowledgments, is much the same. Therefore an acknowledgment by payment of interest by such a tenant for life preserves the charge against the remaindermen, although infants (b).

As evidence
of amount of
arrears.

An acknowledgment by a tenant for life of lands charged with a rent-charge in fee is, under the section 42, evidence against the remainderman as to the amount of arrears of such rent-charge (c).

(z) *Roddam v. Morley*, 2 K. & J. 866, 8 S. C. 1 De G. & J. 1.

(a) *Roddam v. Morley*, 1 De G. & J. 1.

(b) *Re Fitzmaurices, Minors*,

15 Ir. Ch. Rep. 445. See also *Burrows v. Gore*, 6 H. L. C. 907.

(c) *Smith v. Smith*, 5 Ir. Ch. Rep. 88.

In *Bolding v. Lane* (d), Lord Westbury, C., said, the intention of the 3 & 4 Will. 4, c. 27, s. 42, was to enact a plain and simple rule, that no person having a charge on lands shall recover more than six years' interest on such charge, against any other person having an interest in the lands, without an acknowledgment in writing, signed by such person, or by some former owner from whom the interest is derived. If this is to be literally understood, the acknowledgment of a tenant in tail would not bind a remainderman in tail, because such remainderman in tail does not derive his interest under the previous tenant in tail. And so likewise, if this language is to be construed without reference to the facts of the case, an acknowledgment by a tenant in fee under a will would not bind a person who became entitled to the fee under an executory devise; and an acknowledgment not made by the person from whom the arrears are sought to be recovered, but by a former owner from whom the interest in the land is derived, and whose estate had been cut down to an estate for life before he made the acknowledgment, would probably not be within the meaning of Lord Westbury's observations. A reasonable interpretation of those observations would be that the acknowledgment must be by the person sought to be charged, or by some former owner, from whom the interest is derived, or by some person who at the time of signing the acknowledgment represented the estate under the instrument which created the limitations in remainder (e).

But an acknowledgment by a tenant for life cannot revive, against a remainderman, a demand already barred (f).

In the case of *Roddam v. Morley* (g), Wood, V.-C., — bond debts;

(d) 1 De G., J. & S. 122.

(e) *Re Fitzmaurices, Minors*, supra.

(f) *Gregson v. Hindley*, 10 Jur. 883; *Fordham v. Wallis*, 10

Hare, 217; *Smith v. Smith*, supra.

See also *Atkins v. Tredgold*, 2 B. & C. 23.

(g) 2 K. & J. 386.

said a bond debt is not a debt "charged on or payable out of land," within the section 40 of 3 & 4 Will. 4, c. 27, and that even if it were, he did not think that the person liable to pay under that section would be the tenant for life of the obligor's real estate, for the purpose of holding a payment by him to have the effect of keeping the debt alive as a charge against the estate. But it was afterwards held that an acknowledgment by a devisee for life of real estate under the will of the obligor is an acknowledgment by a person liable by virtue of the bond within the meaning of the section 5 of the 3 & 4 Will. 4, c. 42, and sets free the remedy not only as to himself but generally; and therefore an acknowledgment by such devisee by payment of interest on the bond preserves, against the remainderman, the right to the principal (*h*).

In *Coope v. Cresswell* (*i*), Lord Chelmsford, C., seems to have doubted the case *Roddam v. Morley*. He said he could not concur in the reasoning which led to the ultimate decisions in that case, and that it was unnecessary for him to consider whether the parties, tenant for life and remainderman, are so united in interest, that payment by the one might be regarded as an acknowledgment by the other.

—simple contract debts.

Acknowledgments operate under the 21 Jac. 1, c. 16, and the 9 Geo. 4, c. 14, only as amounting to a fresh promise to pay, and as constituting a new cause of action (*h*), and therefore must be made by the original party or his agent (*i*). Consequently, in the case of a simple contract debt, a promise by a tenant for life would not bind those in remainder, nor would the pro-

(*h*) *Roddam v. Morley*, 1 De G. & J. 1, reversing the decision of Wood, V.-C., 5 C. 2 K. & J. 345.

(*i*) L. R., 2 Eq. C., C. A. 112, 126.

(*k*) *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10

Hare, 217; *Roddam v. Morley*, 1 De G. & J. 1; *Mordis v. Bannister*, 4 Drew. 432, 439; *Briggs v. Wilson*, 5 De G., M. & G. 12; *Godwin v. Culley*, 4 Ex., N. S. 373.

(*l*) 2 K. & J. 341.

mise of an executor bind the heir or devisee (*m*). But the payment of interest on a judgment by the executor of the conusor will keep it alive against his heir (*n*).

The acknowledgment by payment of interest by a doweress of gavelkind lands, on a mortgage thereof made by her husband, has been held to bind the two daughters of one of the co-heirs in gavelkind, as their agent (*o*).

Doweress of gavelkind lands.

The person making the acknowledgment may sustain, and be liable in, at one and the same time, and either alone or jointly with others, two perfectly distinct characters, and each with rights and liabilities in law wholly different. He may be liable in his individual character, or personally, and also in a representative character (*p*), or in a double representative character (*q*), and the acknowledgment may bind him in only one of such characters or in both of them (*r*). The case is then that of two persons, and therefore to distinguish them is necessary, and the question, in truth, is, not what is the extent or the effect of the acknowledgment, but by whom it is made (*s*), and the courts look to the character in which the acknowledgment was made (*t*).

By one person liable in two characters.

It may be remarked that in those cases where the acknowledgment was given by one of several persons interested in the property, and the acknowledgment by one was held to bind the others, not only did the person making it fill several characters wholly different, but the estate was one and the same (*u*); but that in those

(*m*) 2 K. & J. 341; *Putnam v. Bates*, *Fordham v. Wallis*, *supra*; *Briggs v. Wilson*, 5 De G., M. & G. 12.

(*n*) See *Kirkwood v. Lloyd*, 11 Ir. Eq. R. 561; *Murray v. Clarke*, 4 Ir. C. L. R. 610.

(*o*) *Ames v. Mannering*, 27 Beav. 583.

(*p*) *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Hare, 217.

(*q*) *Coops v. Cresswell*, L. R.,

2 Eq. C., C. A. 112; *Fordham v. Wallis*, *supra*.

(*r*) *Fordham v. Wallis*, *Putnam v. Bates*, *supra*.

(*s*) *Fordham v. Wallis*, 10 Hare, 217.

(*t*) *Atkins v. Tredgold*, 2 B. & C. 23; *Way v. Bassett*, 5 Hare, 55; *Fordham v. Wallis*, *supra*; *Coops v. Cresswell*, L. R., 2 Eq. C., C. A. 112.

(*u*) *Roddam v. Morley*, 2 K. & J. 386; 1 De G. & J. 1.

cases where the acknowledgment was given by one of several persons interested in the property; and the acknowledgment was held not to bind the others, there were several distinct estates or shares of estates (*x*).

Constructively. An acknowledgment by payment may be made constructively by a person; as where one and the same person is at one and the same time liable to pay, and also entitled to receive the money, and will preserve the right as well as if there had been two distinct persons (*y*).

By specialty debtor when beyond seas.

An acknowledgment by a specialty debtor when beyond the seas, that is, out of England, Ireland, Scotland, and the Channel Islands, will preserve the right for twenty years after his return (*z*), and in the case of two or more joint debtors, although judgment may have been obtained against the other or others (*a*).

SECTION III.

To whom Acknowledgments are to be made.

At common law.

An acknowledgment, before Lord Tenterden's Act (*b*), to prevent the operation of the Statute of Limitations (*c*), made to a stranger was sufficient (*d*). This was by the common law (*e*). The latter statute contains no express provision as to acknowledgments.

To creditor or his agent.

Some of the modern Statutes of Limitation are silent as to the person to whom an acknowledgment is to be made. Lord Tenterden's Act (*f*) is one. This act

(*x*) *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Hare, 217; *Dickenson v. Teasdale*, 1 De G., J. & S. 52; *Coops v. Cresswell*, L. R., 2 Eq. C., C. A. 112.

(*y*) Vide ante, Sect. I. of this Chap., p. 588.

(*z*) 3 & 4 Will. 4, c. 42. ss. 5, 7.

(*a*) 19 & 20 Vict. c. 97, s. 11.

(*b*) 9 Geo. 4, c. 14.

(*c*) 21 Jac. 1, c. 16.

(*d*) *Mountstephen v. Brooke*, 8 B. & Ald. 141; *Peters v. Brown*, 4 Esp. 46; *Halliday v. Ward*, 3 Camp. 32; *Eicke v. Nokes*, 1 Moo. & Rob. 359. See also *Clark v. Hougham*, 2 B. & C. 149, 154, 157.

(*e*) 4 Drew. 439.

(*f*) 9 Geo. 4, c. 14.

refers to only the statute of James, and requires the acknowledgment to be in writing. It does not require in express terms that the acknowledgment should be made to the party making the claim; the intention was to leave that point as it stood upon the decisions under the statute of James; and it was unnecessary to introduce words importing that the promise to pay must be made to the person making the claim (*g*).

But inasmuch as acknowledgments operate under the 21 Jac. 1, c. 16, and the 9 Geo. 4, c. 14, only as and when amounting to a fresh promise to pay, and as constituting a new cause of action (*h*), the acknowledgment must be made either to the creditor himself or to his agent, and not to a mere stranger (*i*); and when it is by an account stated, the account must be with the creditor or with his agent (*j*). An acknowledgment made to an agent of the creditor is made to the creditor himself. In equity it would be considered, that if an application were made by the solicitor of the creditor, and the debtor wrote to say that he would pay the debt, that would be the same as if he had made the promise himself (*k*).

In *Smith v. Poole* (*l*), the acknowledgment relied upon and held by the court to be sufficient was contained in an inventory and account made and exhibited by a sole executor upon oath in a suit instituted against him in the ecclesiastical court, but the plaintiff appears not to have been a party to that suit. The point, however, that the acknowledgment ought to have

Smith v. Poole.

(*g*) *Moodie v. Bannister*, 4 Drew. 432, 444.

(*h*) *Portman v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Hare, 217; *Briggs v. Wilson*, 5 De G., M. & G. 12; *Roddam v. Morley*, 1 De G. & J. 1; *Moodie v. Bannister*, 4 Drew. 432, 442; *Coope v. Cresswell*, L. R., 2 Eq. C. 106, 120.

(*i*) *Godwin v. Culley*, 4 Ex.,

N. S. 378; *Fuller v. Redman*, 26 Beav. 614, 619; *Moodie v. Bannister*, supra. See also *Grenfell v. Girdlestone*, 2 You. & C., Ex. C. 622, 676.

(*j*) Per Littledale, J., 1 Ad. & E. 489; per Parke, B., 5 M. & W. 667; 2 Ex. 156.

(*k*) Per Sir J. Romilly, M. R., *Fuller v. Redman*, supra.

(*l*) 12 Sim. 17.

been made to the creditor or his agent was not raised. The case is at variance with the decisions of the courts of law, and cannot be relied on with reference to this question.

When to a
third person.

The Common Law Amendment Acts (*m*), the Common Law Procedure Amendment Act, Ireland, 1853 (*n*), and the 1 Vict. c. 28, declaring the effect of the 3 & 4 Will. 4, c. 27, as between mortgagors and mortgagees, are also instances of not expressing to whom the acknowledgments under them are to be given; and although acknowledgments operate under the 21 Jac. 1, c. 16, and the 9 Geo. 4, c. 14, only as amounting to a fresh promise to pay, and as constituting a new cause of action, and therefore, as just shown, must be given to the creditor himself, or to his agent, and not to a mere stranger, yet under the 3 & 4 Will. 4, c. 42, 3 & 4 Vict. c. 105, 16 & 17 Vict. c. 113, the acknowledgment is not intended to operate on any such footing, nor could it possibly so operate, because the action in which the acknowledgment is to be operative must always be founded and maintained on the original obligation, and on that only (*o*); and therefore the acknowledgment may be made to a third person (*p*).

When party
need not be
named.
How shown.

Lord Tenterden's Act, however, does not require the name of the party to whom an acknowledgment in writing is made to be inserted in it. If the acknowledgment be in a letter, the address will be evidence; and if the letter were in an envelope, evidence might be given to connect the two: and so evidence may be given showing for or to whom a written acknowledgment is made, by delivery or otherwise (*q*).

To one of

Since the 3 & 4 Will. 4, c. 27, an acknowledgment

(*m*) 3 & 4 Will. 4, c. 42; 3 & 4 Vict. c. 105.

(*n*) 16 & 17 Vict. c. 113.

(*o*) *Roddam v. Morley*, 2 K. & J. 336; 1 De G. & J. 1.

(*p*) *Foreyth v. Bristowe*, 8 Ex. 716; *Moodie v. Bannister*, 4 Drew. 432. See also *Howcutt v. Bonsor*, 3 Ex. 491.

(*q*) *Hartley v. Wharton*, 11 Ad. & E. 924.

made to one or more of several coparceners, joint tenants, or tenants in common, unless in the character or capacity of agent or agents for any other or others of them, will not be available for such other or others (*r*).

several coparceners, &c., not available for the others.

An acknowledgment under the section 14 of the 3 & 4 Will. 4, c. 27, is to be given to the person entitled to the land or the rent; under the section 28 of the same statute, to the mortgagor, or to the person claiming through him his estate, or to the agent of such mortgagor or person; and under the sections 40 and 42 of the same statute, to the person entitled to the matters to which those sections are applied, or to his agent, and in none of such cases will an acknowledgment given to a mere stranger, and who cannot be considered either expressly or by implication as such agent (*s*), be available under those provisions for any person claiming the benefit of them.

When not to third persons.

A defendant in a suit, in answer to questions put by the plaintiff, admitting, in effect, a yearly tenancy, and the legal estate to be in the plaintiff, is an acknowledgment given to the person entitled, within the sect. 14 (*t*).

Why, said Wigram, V.-C. (*u*), the mortgagee should not be allowed to make an admission in writing, signed by himself, of his mortgage title to a third person, of which the mortgagor may have the benefit, I do not know; but the statute requires that the admission should be made to the mortgagor himself.

The recognition by the mortgagee of the right of redemption in a transfer of the mortgage, the mortgagor not being a party to the transfer, is not available for, and the assignee is not a person claiming the estate

(*r*) Sect. 12.

(*s*) See *Grenfell v. Girdlestone*, 2 You. & C., Ex. C. 662, 676; *Forsyth v. Bristone*, 8 Ex. 716; *Moodie v. Bannister*, 4 Drew. 432.

(*t*) *Goode v. Job*, 1 E. & E. 6, 28 L. J., Q. B. 1, 5 Jur., N. S. 145, S. C.

(*u*) *Batchelor v. Middleton*, 6 Hare, 75.

of, the mortgagor (*v*). So letters written by a mortgagee to his own solicitor cannot affect his title acquired by the statute (*w*).

Baker v. Wetton.

In *Baker v. Wetton* (*x*) was raised, but not decided, the question, whether, although a bill for redemption alleges that the mortgagee kept accounts of the rents received by him during his possession, and otherwise treated himself as a mortgagee, the bar created by the section 28 was defeated. If the accounts be in form between the mortgagee and mortgagor,—and the mere introduction of the name of the latter would be sufficient, although even that is not essential (*y*),—and be signed by the mortgagee, or by some person claiming through him,—that would be a sufficient acknowledgment to prevent the bar. If the accounts be merely by the mortgagee, and not between him and the mortgagor, they would not be a sufficient acknowledgment within the provision just mentioned (*z*).

To husband before or after wife's death, of a legacy.

An acknowledgment to a husband entitled in right of his wife to a pecuniary legacy, and made during her life, would be given to the person entitled within the section 40 of the 3 & 4 Will. 4, c. 27; but made to him after her death, and before he obtains letters of administration to her, would not be given to such a person (*a*), for then his title is not *jure mariti*, but as administrator, and as administrator he has no title until he obtains administration (*b*), and even then the section 6 would not apply.

To person entitled to, a

An acknowledgment of the right to the personal estate, or to a share of the personal estate of a person

(*v*) *Lucas v. Dennison*, 13 Sim. 584; *Batohelor v. Middleton*, *supra*; *Stansfield v. Hobson*, 16 Beav. 226; 3 De G., M. & G. 620.

(*w*) *Stansfield v. Hobson*, *supra*.

(*x*) 14 Sim. 426.

(*y*) *Hartley v. Wharton*, 11 Ad. & E. 934.

(*z*) See *Pott v. Clegg*, 16 M. & W. 321; *Bristow v. Miller*, 11 Ir. L. R. 461.

(*a*) *Holland v. Clark*, 1 You. & C. C. C. 151.

(*b*) *Vide supra*, p. 465.

dying intestate, is to be made to the person entitled thereto or to his agent (c). share of intestate's estate,

The acknowledgment under the section 42 of the 3 & 4 Will. 4, c. 27, is to be given either to the person entitled to the arrears, or to the agent of such person. —arrears of rent, &c.
In *Smith v. Smith* (d), the acknowledgment was addressed to no person, was dated after the assignment of the arrears to the petitioner, but was not addressed to her, and the affidavit verifying the signature to the acknowledgment contained no statement in relation to the circumstances under which, or the person to whom, the acknowledgment was given. The court thought the acknowledgment insufficient, but found a decision of the point unnecessary. Parol testimony, however, showing to whom the acknowledgment was made, was admissible (e).

An acknowledgment made to a husband entitled to a legacy in right of his wife, whom he had survived, but to whom he had not, although he afterwards, obtained administration, of arrears of interest in respect of the legacy, is not given to the person entitled to such arrears within the section 42 of the 3 & 4 Will. 4, c. 27, and the case is not assisted by the section 6 (f). To husband for such arrears after wife's death, but before administration.

An acknowledgment by payment may be made constructively to a person; as where one and the same person is at one and the same time entitled to receive and also liable to pay the money, and will preserve the right as well as if there had been two distinct persons (g). To a person constructively.

It is apprehended that an acknowledgment made under the sections 14, 28, 40 and 42 of 3 & 4 Will. 4, c. 27, and section 13 of 23 & 24 Vict. c. 38, to the person to whom it is to be made under those sections respectively, when such person is under any disability, To persons under disability.

(c) 23 & 24 Vict. c. 38, s. 13.

(d) 5 Ir. Ch. Rep. 88, 100, 101.

(e) *Hartley v. Wharton*, 11 Ad. & E. 934; *supra*, p. 583.

(f) *Holland v. Clark*, 1 Y. & C. C. C. 151.

(g) *Vide ante*, Sect. I. of this Chap., p. 588.

would be equally available as if made to such person when free from disability. That the acknowledgment made to a person who when his right accrued was not, but who subsequently, and before the period of limitation expires, is under disability, would be available, seems clear; for if not available the period having commenced the right would be extinguished, or the remedy barred, when the period had expired, and the acknowledgment would be rendered nugatory. Hence it would seem to follow, that an acknowledgment made to a person under disability when the right accrues will be as available as if made to him when not under disability. When made just before the disability ceases, he would be entitled to assert his right within the period of limitation computed from the making of such acknowledgment, and not merely for ten years from the time when the disability ceases, under the section 16 (g).

Tenant for life
or remainder-
man.

A tenant for life and a tenant in remainder are privies in estate, and, as in the case of a release (h), so, it is apprehended, in the case of an acknowledgment, the acknowledgment made to either is available for the benefit of the other.

SECTION IV.

Agents by and to whom Acknowledgments are to be made.

Agency at
common law.

At common law, the general rule is, who acts by another acts by himself. *Qui facit per alium facit per se* (i). The act of such other person, however, is not, as

Its efficacy.

(g) Vide Chap. VI. Sect. I. of this Book.

(h) Co. Litt. 267 b.

(i) 2 Mod. 309; 10 Ib. 310; 11 Ib. 88; 2 Ld. Raym. 792; *Coare v. Gidlett*, 4 East, 85; *Homan v.*

Andrews, 1 Ir. Eq. Rep., N. S. 106; *Rew v. Pettet*, 1 Ad. & E. 126; *Jones v. Hughes*, 5 Ex. 104; *Forster v. Thompson*, 2 Com. & L. 568; *Norris v. Cooke*, 7 Ir. C. L. R. 37; 6 H. L. C. 296.

that of the person himself is, equally efficacious or conclusive as to the latter. The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been his agent (*k*).

The legislature, however, sometimes requires acts to be done by persons themselves, so that such acts cannot be done by agents, as acknowledgments (*l*); and sometimes gives equal efficacy to the acts of persons and to the acts of their agents; but in all such cases uses express words for the purpose (*m*).

What may and what may not be done by agent.

An acknowledgment of a simple contract debt may now be made both by and to an agent (*n*). The latter act, however, does not give validity to acknowledgments made before it was passed (*o*), but only to those made afterwards, although the debt acknowledged arose before the passing (*p*). A specialty debt may be also so acknowledged (*q*).

An acknowledgment by payment under the 3 & 4 Will. 4, c. 42, and under the 1 Vict. c. 28, may be made by an agent; for such an acknowledgment, as well as one by writing under the 3 & 4 Will. 4, c. 27, may

(*k*) Per Sir W. Grant, M. R., *Fairlie v. Hastings*, 10 Ves. 128.

(*l*) 9 Geo. 4, c. 14; *Hyde v. Johnson*, 2 Bing. N. C. 776; *Archer v. Leonard*, 15 Ir. Ch. Rep. 267; *Leland v. Murphy*, 16 Ib. 500; *Bristow v. Miller*, 11 Ir. L. R. 461; *Clark v. Alexander*, 8 Scott, N. R. 147; 16 & 17 Viet. c. 113, s. 24; *In re Lendinning*, 9 Ir. Ch. Rep. 284; 3 & 4 Will. 4, c. 27, ss. 14, 28.

(*m*) 29 Car. 2, c. 3, ss. 3, 4, 5, 17; 3 & 4 Will. 4, c. 27, ss. 40, 42; c. 42, s. 5; *Hyde v. Johnson*, *Homan v. Andrews*, 1 Ir. Ch.

Rep. 106; 19 & 20 Vict. c. 97, s. 13; *Archer v. Leonard*, *Leland v. Murphy*, *supra*.

(*n*) 9 Geo. 4, c. 14; 19 & 20 Vict. c. 97, s. 18. Vide Sects. I and II. of this Chap.

(*o*) *Archer v. Leonard*, 15 Ir. Ch. Rep. 267.

(*p*) *Leland v. Murphy*, 16 Ir. Ch. Rep. 500.

(*q*) 3 & 4 Will. 4, c. 42. See *Forsyth v. Bristow*, 8 Ex. 716; *Roddam v. Morley*, 1 De G. & J. 1; *Coops v. Creeswell*, L. R., 2 Eq. Ca., C. A. 112.

be made by an agent (*r*); and both kinds of acknowledgment under the former statute are intended to be placed on the same footing (*s*), and these statutes are *in pari materia* (*t*).

An acknowledgment of title to land and rent, of the title of a mortgagor of land or rent, or of his right of redemption, may be made to but not by an agent (*t*), whilst an acknowledgment of a right of redemption (*u*), of a right to money charged on land or rent, to arrears of rent and of interest for money so charged, and for legacies (*x*), of the title of a mortgagee (*y*), and to the personal estate, or any share of the personal estate, of persons dying intestate (*z*), may be made both by and to an agent, and under sect. 40 of the former statute as well by payment as in writing (*a*). But in whatever mode made, if made by a person expressly or impliedly authorized to make it, it will be equivalent to an acknowledgment by the party liable (*b*).

Mode of
appointing
agents.

None of the Statutes of Limitation specify the mode in which an agent for making an acknowledgment under any of their provisions is to be appointed; and, therefore, the appointment of such agents may be in any of the modes recognized by law.

No one can become the agent of another person except by the will of that other person. His will may be manifested in writing, or orally, or simply by placing another in a situation in which according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other

(*r*) *Chinnery v. Evans*, 11 H. L. C. 115.

(*s*) *Fitzmaurices, Minors*, 15 Ir. Ch. R. 445; *Coope v. Creswell*, L. R., 2 Eq. Ca., C. A. 112.

(*t*) 3 & 4 Will. 4, c. 27, ss. 14, 28.

(*u*) *Trulock v. Robey*, 12 Sim. 402; *Stansfeld v. Hobson*, 16 Beav. 236; 3 De G., M. & G. 620.

(*x*) *Ib.* sects. 40, 42.

(*y*) 1 Vict. c. 28. See *Forryth v. Bristowe*, 8 Ex. 716.

(*z*) 28 & 24 Vict. c. 38, s. 13.

(*a*) *Chinnery v. Evans*, 11 H. L. C. 115. Smith, M. R., thought otherwise. See 1 Ir. Ch. Rep. 112.

(*b*) *Homan v. Andrews*, 1 Ir. Ch. Rep. 106.

is understood to represent and act for the person who has so placed him, but in every case it is only by the will of the employer that an agency can be created. The appointment of an agent therefore is either express or implied. When express may be either in writing or by parol. When implied may be either by the employment or by the adoption and ratification of the acts of another person (c).

The appointment of an agent, unless required by law, as in some of the provisions of the Statute of Frauds (d), need not be, on appointments by natural persons, in writing (e), although the act of the agent be required to be in writing (f). Unless required need not be in writing.

An agent for a corporation aggregate, however, in matters which affect any interest of the corporation (g), must, in general, be appointed, either by record (h), or by writing under the common seal of the corporation (i); for the general rule, subject to certain exceptions which confirm it, is, that a corporation, howsoever created, and whatever may be the objects of its creation, cannot express its will, or do any act, otherwise than by writing under the common seal of the body corporate, either in relation to real or to personal property (k). And the rule is one by no means of a merely technical nature, or How to be appointed by corporations where their interest may be affected.

(c) *Pole v. Leask*, 28 Beav. 562, affirmed in D. P., 9 Jur., N. S. 829.

(d) 29 Car. 2, c. 3, ss. 1, 3.

(e) *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Coles v. Trecothick*, 9 Ves. 250; *Mortlock v. Buller*, 10 Ves. 311; *Deverell v. Lord Bolton*, 18 Ib. 509.

(f) 7 Ir. C. L. R. 41.

(g) See *Smith v. The Birmingham Gas Co.*, 1 Ad. & E. 526, 530.

(h) *The Mayor of Thetford's case*, 1 Salk. 192; 3 Ib. 103; 2 Lord Raym. 848; Holt, 171, recognized in *The Fishmongers' Co. v. Robertson*, 5 M. & G. 131, 192.

(i) Plowd. 91; *Horn v. Joy*, 1 Ventr. 47; 16 East, 9; on *Horn v. Joy*, see 1 Ad. & E. 530; *Bowen v. Morris*, 2 Taunt. 374; *Arnold v. Mayor of Poole*, 5 Scott, N. R. 741; 2 Dowl., N. S. 574, S. C.; *The Fishmongers' Co. v. Robertson*, supra.

(k) *Taylor v. Dulwich College*, 1 P. W. 656; *Winne v. Bampton*, 3 Atk. 473; *Wilmot v. Corporation of Coventry*, 1 Y. & C., Ex. 518; *East London Waterworks Co. v. Bailey*, 4 Bing. 283; *Church v. The Imperial G. L. & C. Co.*, 6 Ad. & E. 846; *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815.

which it would at all be safe to relax, except in cases warranted by the principles of the exceptions which have been admitted. The seal is required as authenticating the concurrence of the whole body corporate, and is the only authentic evidence of what the corporation has done, or agreed to do, and not a mere relic of ignorant times. Either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation (z).

The decisions establishing the exceptions to this rule furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing, in terms, the exact limit, that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed (a).

Where act
done is for
their benefit.

And although a person acting as agent for a corporation may not have been appointed either by record or by writing under the common seal, yet the corporation, by the adoption of his acts, may be bound (b). Unless

(z) *The Mayor of Ludlow v. Charlton*, supra; *Cope v. The Thames Haven Dock and Railw. Co.*, 18 L. J., N. S., Ex. 344; *Arnold v. The Mayor of Poole*, 5 Scott, N. R. 741, 2 Dowl., N. S. 574, S. C.; *Diggle v. London and Blackwall Railw. Co.*, 5 Ex. 442; *London Dock Co. v. Sinnott*, 8 E. & B. 347.

(a) *Church v. The Imperial, G. L. & C. Co.*, 6 Ad. & E. 846; *Mayor of Ludlow v. Charlton*, supra; *Hall v. Mayor of Swansea*, 5 Q. B. 526; *Diggle v. London and Blackwall Railw. Co.*, 5 Ex.

442; *Australian Royal M. & N. Co. v. Marzetti*, 11 Ex. 228.

(b) See *The Mayor of Thetford's case*, supra; *Bowen v. Morris*, 2 Taunt. 374; *Wood v. Tate*, 2 B. & P., N. R. 247; *Mayor of Stafford v. Tull*, 4 Bing. 75; *Ecclesiastical Commissioners v. Merrett*, L. R., 4 Ex. 162, 38 L. J., Ex. 93, S. C.; *London and Birmingham Railw. Co. v. Winter, Craig & P.* 57; *Arnold v. The Mayor of Poole*, supra; *The Fishmongers' Co. v. Robertson*, 5 Man. & G. 131. On this case see *The Copper Miners Co. v. Fox*, 16 Q. B. 229, 237.

perhaps where the subject matter be of an incorporeal nature (*c*). But it is not very easy to reconcile all the cases on the subject (*d*).

But this mode of appointing an agent for a corporation aggregate does not apply to those agents to whom any thing is done for the benefit of the corporation (*e*), as an acknowledgment of a title in the corporation to land or to rent (*f*), of a right of redemption (*g*), of a right to a sum of money charged on land, or to any legacy (*h*), or to any arrears of rent, or of interest for such sum or legacy (*i*), or of a right to any land in any mortgage (*k*), or to the personal estate, or any share of the personal estate, of any person dying intestate (*l*), or to any specialty debt (*m*), or to any simple contract debt (*n*).

Any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that that relation exists (*o*), although the relation is not expressed. Thus a mortgagee in possession, in a letter to the grandfather of the heir of the mortgagor, merely referred to the property, and to the title of such heir, and was held to have recognized the grandfather as the agent of such heir (*p*) for the purposes of the sect. 28 of the 3 & 4 Will. 4, c. 27. A similar recognition would be sufficient for the purposes of the sects. 14, 40 and 42 of the same statute, for a specialty debt under the 3 & 4 Will. 4, c. 42, and for a simple contract debt under the 19 & 20 Vict. c. 97, s. 13.

Recognition of a person acting as agent.

(*c*) See *Rea v. Inhabitants of Chipping Norton*, 5 East, 239; *Rea v. Inhabitants of North Duffield*, 3 M. & S. 247.

(*d*) Craig & P. 63.

(*e*) See *Cooper v. Gooderick*, Cro. El. 862; 5 Man. & G. 196.

(*f*) 3 & 4 Will. 4, c. 27, s. 14.

(*g*) Sect. 28.

(*h*) Sect. 40.

(*i*) Sect. 42.

(*k*) 1 Vict. c. 28.

(*l*) 23 & 24 Vict. c. 38, s. 13.

(*m*) 3 & 4 Will. 4, c. 42, s. 5.

(*n*) 9 Geo. 4, c. 14.

(*o*) Per Lord Ellenborough, *C. J., Dickenson v. Cernard*, 1 B. & Ald. 677; *Inglis v. Spence*, 1 C., M. & R. 432.

(*p*) *Trulock v. Robey*, 12 Sim. 402.

An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him (*g*); for if an act be done by a person *as agent*, it is in general immaterial whether the authority be given prior or subsequent to the act (*h*), or that he did not know the intended principal (*i*). *Omnis ratihabitio retrotrahitur et mandato æquiparatur* (*k*). The principal is bound by the act, whether it be to his detriment or for his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority (*l*). But a subsequent ratification by a person who has not given any precedent authority has no such effect (*m*).

The doctrine *omnis ratihabitio retrotrahitur et mandato æquiparatur* is one intelligible in principle, and easy in its application, when applied to cases of contract. In cases of tort there is more difficulty (*n*). The doctrine, however, is not universally true, and is not applied where the application would defeat a prior vested right (*o*), and the ratification must be by an existing person on whose behalf the contract might have been made at the time (*p*).

The adoption of an agency for a person when under

(*g*) 6 Man. & G. 242.

(*h*) Per Parke, B., *Buron v. Denman*, 2 Ex. 167, 188.

(*i*) *Hull v. Pickersgill*, 1 Brod. & B. 282.

(*k*) 9 Co. 106; *Maclean v. Dunn*, 4 Bing. 722; *Lewis v. Read*, 13 M. & W. 834; *Fitzmaurice v. Bailey*, 6 Ell. & B. 868; 6 H. L. C. 296; *Bigg v. Strong*, 3 S. & G. 590; 4 Jur., N. S. 983, S. C.; *Trulock v. Robey*, 12 Sim. 402; *Forster v. Bates*, 12 M. & W. 233; *Rew v. Pettit*, 1 Ad. & E. 196; *Jones v.*

Hughes, 5 Ex. 104; *Forster v. Thompson*, 2 Con. & L. 568; *Norris v. Cooke*, 7 Ir. C. L. R. 37.

(*l*) 6 Man. & G. 242.

(*m*) *Wilson v. Tummam*, 6 Man. & G. 236.

(*n*) *Buron v. Denman*, 2 Ex. 167, 188; *Bird v. Brown*, 4 Ib. 786.

(*o*) *Buron v. Denman*, *Bird v. Brown*, and cases there cited.

(*p*) *Kelner v. Baxter*, L. R., 2 C. P. 174; *Scott v. Lord Ebury*, Ib. 264.

disability may be ratified by such person after the disability has been removed (*q*).

The authority of the agent should have reference to the claim in question, for the authority may be sufficient for the general purposes of the agency, but insufficient to authorize the agent to make admissions as to the claim (*r*).

Agent's authority should have reference to the claim.

The agent must be the agent of the party liable (*s*), and the party liable under the section 40 of the 3 & 4 Will. 4, c. 27, is a party liable in respect of his interest in (*t*), or connected with (*u*), the land or the rent, and a devisee of an estate in trust for sale is such a party (*x*).

Should be agent of the party liable.

The agent contemplated by the section 40 of the 3 & 4 Will. 4, c. 27, would seem to be an agent acting directly under the authority of his principal, and doing an act which the principal, had he been present, could himself have done (*y*), and the language of the section 42 of the same statute corresponds with the section 40. Therefore a master in chancery making a report cannot be said to be, for the purposes of the former section, the agent of the parties interested in the subject-matter of the report (*z*).

Who may be agents under 3 & 4 Will. 4, c. 27.

A *cestui que trust* may, as the agent of his trustees, make an acknowledgment so as to preserve a claim (*a*).

Cestui que trust.

One of two joint owners of lands conveyed to them for indemnifying other lands subject to a charge, making, in proper time, an acknowledgment of the

Joint-owners.

(*q*) *Trulock v. Robey*, 12 Sim. 402.

(*r*) See *Whitehouse v. Abberley*, 1 Car. & K. 642.

(*s*) See *Taft v. Stephenson*, 1 De G., M. & G. 28.

(*t*) *Elcey v. Normood*, 5 De G. & S. 240.

(*u*) Per Wood, V.-C., *Roddam v. Morley*, 2 K. & J. 345; *Chin-*

nery v. Evans, 11 H. L. C. 115; *Taft v. Stephenson*, supra.

(*x*) *Lord St. John v. Boughton*, 9 Sim. 219.

(*y*) *Hill v. Stawell*, 2 Jebb & S. 389.

(*z*) *Ib.*

(*a*) *Vincent v. Wellington*, Longf. & T. 456.

charge, may be considered as the agent of the owner of such other lands in respect of such charge (*y*).

A person at the request of another.

A person at the request, on the dictation, and in the name of the person liable, making an acknowledgment in writing of the claim to the person entitled, is the agent of the person liable (*z*).

Dowress.

An owner of gavelkind lands made an equitable mortgage of them, and died intestate, leaving his widow dowable, and thereupon she took possession with the consent of the heirs and paid interest on the mortgage, until 1844. One of the coheirs made a payment of interest in 1850, and another of them also paid some in 1846, and died leaving two daughters. The widow was held to be the agent of such daughters (*a*).

Assignee of mortgagor.

Although the 1 Vict. c. 28, does not expressly require that the payment shall be made by the party liable or his agent, yet if that be implied the assignee of the mortgagor is sufficiently an agent for that purpose (*b*).

Treasurer of a company.

The treasurer of a harbour company, mortgagors (*c*), and the solicitor of the person liable, and of the person entitled (*d*), are agents within the sections 40 and 42 of the 3 & 4 Will. 4, c. 27.

Receiver.

A receiver paying interest on a mortgage debt out of the estate of the mortgagor is the agent of the mortgagor within the section 40 of the 3 & 4 Will. 4, c. 27 (*e*). For such payments are by order of the court. The hand to make the payment is the receiver's, but the authority is the court, and that payment cannot be said to be the voluntary act of the debtor, for the appointment of the receiver must be

(*y*) See *Homan v. Andrews*, 1 Ir. Ch. Rep. 106.

(*z*) *Lord St. John v. Bough-ton*, 9 Sim. 219.

(*a*) *Ames v. Mannering*, 27 Beav. 583.

(*b*) See *Forsyth v. Bristowe*, 8 Ex. 716.

(*c*) *Jortin v. The South Eastern Railw. Co.*, 2 S. & G. 57; 6 De G., M. & G. 270.

(*d*) *Toft v. Stephenson*, 1 De G., M. & G. 28.

(*e*) *Chinnery v. Evans*, 11 H. L. C. 115.

considered as an adverse proceeding, and the allocation of the profits of the estate away from the debtor is the act of the court, according to the legal rights of the parties. But the real value of an order on the receiver to make a payment on account of a creditor's demand is, that it is a specific acknowledgment in the presence of the debtor of the debt being due, and an admission that whatever portion of the debt is not covered by the payment remains due and unpaid. A payment made under an order of a competent court, in the presence of a debtor, on account of a creditor's demand, is something more than the voluntary payment out of court by the hand of the debtor himself, because it is a legal acknowledgment, not only of the liability of the debtor, but of the rights of the creditor, and that not only in the presence of, and therefore by the debtor, but by all persons interested in his estate (z).

The same person may be at one and the same time the agent of the person by whom; and of the person to whom, an acknowledgment is to be given. Such a case, however, is more commonly the result of circumstances, rather than an act of deliberate choice on the part of the principal, and, as it often involves difficult and embarrassing questions (a), is to be avoided.

SECTION V.

The Time when Acknowledgments are to be made.

The time for making an acknowledgment under the Statutes of Limitations varies with the subject to which the acknowledgment, for the purposes of those statutes, relates.

An acknowledgment under the section 14 of the Of title to

(z) *Cronin v. Donnelly, Ir. R.*,
3 C. L. 289.

(a) See *Vandeleur v. Blagrove*, 6 Beav. 565.

land and rent
before time of
limitation ex-
pires.

3 & 4 Will. 4, c. 27, of a title to land or to rent, is to be made before the expiration of the period of limitation, that is, during the existence of the title to be acknowledged; for the acknowledgment is to be given to the person *entitled* to the land or the rent, and on the determination of the period of limitation applicable to land and rent, the right and title thereto are extinguished (*b*), so that they are no longer *in rerum natura*, and consequently no person can be entitled thereto (*c*). The intention of the legislature is that no proceeding whatever shall be taken after the lapse of the period of limitation, unless an acknowledgment be made within that period (*d*).

Of an equity
of redemption
prior to 3 & 4
Will. 4, c. 27.

Courts of equity, before the 3 & 4 Will. 4, c. 27, in all cases of concurrent jurisdiction, acted not so much in analogy as in obedience to the Statutes of Limitation, whilst in many cases of exclusive jurisdiction those courts acted upon analogy to the periods of limitation at law (*e*). The rule as to the redemption of mortgages proceeded either upon, or by analogy to, the statute (*f*); and as those statutes operated merely a suspension of the remedy and did not affect the right, a right of redemption, although an *estate* in equity and not a mere right or title (*g*), might be revived even by a mere parol admission made either to a stranger (*h*), or to the mortgagor, or any one claiming the land through him (*i*), after the right was lost by lapse of time (*k*), as in cases

(*b*) Sect. 34.

(*c*) *Hobson v. Burns*, 13 Ir. L. R. 286.

(*d*) See *Watson v. Birch*, 15 Sim. 523, 524, 529.

(*e*) *Hovenden v. Lord Annesley*, 2 Sch. & L. 607; *Slackhouse v. Barnston*, 10 Ves. 453; *Beckford v. Wade*, 17 Ib. 87; *White v. Parnter*, 1 Knapp, 179; *Foley v. Hill*, 1 Phill. 399.

(*f*) Per Lord Eldon, C., *Foster v. Hodgson*, 19 Ves. 180, 184.

(*g*) *Casborne v. Scarfe*, 1 Atk. 602; 1 Jac. & W. 194.

(*h*) *Stuart v. Hunt*, 4 Ves. 478, n. (*a*); *Hansard v. Hardy*, 18 Ves. 455.

(*i*) *Troughton v. Binks*, 6 Ves. 572; *White v. Parnter*, 1 Knapp, 179.

(*k*) See *Whiting v. White*, Coop. 1; *Reeks v. Postlethwaite*, Ib. 162; *Barron v. Martin*, Ib. 189, 19 Ves. 327, *S. C.*; *Hodde v. Healey*, 1 Mad. & G. 185; *Ball v. Lord Riversdale*, Beatty, 550.

of legal rights. The admission, however, was not inferred from equivocal expressions, and the force of the expressions used might in some degree depend upon the time when they were used. In all the cases just cited the twenty years had actually passed before the expressions were used; and the question was, whether their effect was to revive the right then lost to the mortgagor, and they were held to be insufficient for that purpose. But when the inquiry was, whether what passed was not an admission of a right which at the time was clearly vested in the mortgagor, the question was very different (*l*).

When, said Lord Campbell, C. (*m*), a mortgagee in fee had been in possession for twenty years without any sort of acknowledgment of the existence of the equity of redemption, he was not liable to a suit by the mortgagor to redeem. But the presumption that he was beneficially entitled to the fee simple might have been rebutted at any time during his life, after the lapse of twenty years, by his acknowledgment that he held as mortgagee, and that he was accountable to the mortgagor.

Where a mortgagee, after being in possession for more than twenty years, devised the mortgage property to his son in tail with remainders over, who was also his heir at law, residuary legatee and executor, and subsequently became the purchaser of the equity of redemption, and by the conveyance to him, which, although a party, he did not execute but accepted, he was held to have admitted the right of redemption to be still subsisting, and to have acquired the equitable fee, and that the remainders over after the estate tail were of no effect. It was not necessary to consider what would have been the effect if the devisee in tail had been a

(*l*) *Hodde v. Healey*, 1 Mad. & G. 181, 185.

(*m*) *Pendleton v. Rooth*, 1 De G., F. & J. 81, 89.

mere stranger to whom the mortgagee, after being more than twenty years in possession in that character, had devised the mortgaged lands, and the devisee had taken possession as tenant in tail, and then acknowledged the existence of the right to redeem (*n*).

Wherever by an acknowledgment of the mortgage title after twenty years possession by the mortgagee the right of redemption was restored, the effect was to alter the character of the property as assets of the mortgagee from real estate which it had acquired after the end of twenty years, and to restore to it the character of personalty (*o*).

Since that statute, before the time expires.

Now, however, a mortgagor is not to bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, unless *in the mean time* an acknowledgment of the title of the mortgagor, or of his right of redemption, is given, in writing, signed by the mortgagee or the person claiming through him; and then no such suit is to be brought but within twenty years next after the time of such acknowledgment, or of the last, if more than one, is given (*p*).

The terms of this provision are clear, that the twenty years are to be computed either from the commencement of the possession or receipt of the profits of the land, or the receipt of the rent, by the mortgagee, or from the making of an acknowledgment, or, if more than one, of the last of them; and the natural meaning of the words "in the mean time" would seem to be sometime during that period, and not afterwards, so as to exclude the extinguishment of the title or right of the mortgagor under the provision for that purpose (*q*).

(*n*) *Pendleton v. Root*, 1 Giff. 85; 5 Jur., N. S., S. C.; on app., 1 De G., F. & J. 81.

(*o*) *Pendleton v. Root*, *supra*.
(*p*) 3 & 4 Will. 4, c. 27, s. 28.
(*q*) Sect. 84.

But it has been held that the acknowledgment may be made after the expiration of that period of twenty years so computed, and will enable the mortgagor or the person claiming his estate to bring a suit for redemption for twenty years next after the making of the acknowledgment, or, if more than one, of the last one (*r*).

This case, *Stansfield v. Hobson*, seems to be inconsistent with both the terms of the provision, and the spirit and object of the statute. After the expiration of the twenty years, computed as just remarked, not only is the remedy of the mortgagor, but his right and title also are, extinguished (*s*); and an acknowledgment of title under the section 14, made after the expiration of the period of limitation, has been held to be ineffectual to revive or restore the title (*t*), and yet, according to *Stansfield v. Hobson*, the title or right of the mortgagor is not extinguished at the expiration of twenty years from the time when the mortgagee obtains and holds, without any written acknowledgment, the possession, or the receipt of the profits, of the land, or the receipt of any rent; for such title or right, although in equity an *estate*, and not a naked right or title (*u*), may be revived or restored by a mere acknowledgment made at any time after such possession or receipt, if asserted within twenty years after the making. The report of this case, however, at the Rolls on a preliminary point of pleading (*x*), shows that the defendant was not only mortgagee in his own right, but also a *trustee* of the mortgaged property for the mortgagor. On the original hearing (*y*), the court relied upon the case of *Trulock v. Robey* (*z*), and said it could not distinguish the two cases, but that it was very difficult to say

*Stansfield v.
Hobson.*

(*r*) *Stansfield v. Hobson*, 16 Beav. 236; 8 De G., M. & G. 620; 22 L. J., Eq. 657, on appeal.

(*s*) Sect. 34; 10 Ir. Eq. R. 404.

(*t*) *Hobson v. Burns*, *supra*.

(*u*) *Casburne v. Scarfe*, 1 Atk. 602; 1 Jac. & W. 194.

(*x*) 16 Beav. 189.

(*y*) *Ib.* 236.

(*z*) 12 Sim. 402.

whether *Trulock v. Robey* is quite consistent with all the other cases. In both cases the acknowledgment was made within twenty years next before the commencement of the suit, but in *Trulock v. Robey*, the acknowledgment was made before, whilst in *Stansfield v. Hobson* it was made after, the passing of the 3 & 4 Will. 4, c. 27.

Effect of acknowledgment by mortgagee.

If this interpretation of the sect. 28 be sound, an acknowledgment given accordingly will still have, in equity, as it had before this statute, the effect of converting the property from real estate, which it acquires after the end of twenty years, to personal (a). But if the interpretation be not sustained, a mere acknowledgment after the expiration of twenty years from the commencement of the possession or the receipt by the mortgagee will not have the effect of either reviving the title of the mortgagor, or so converting the property.

Bill for redemption when demurrable.

If a bill for redemption of the land or the rent show, or contain anything raising by inference, with certainty, that the possession of the mortgagee commenced more than twenty years before the commencement of the suit, the bill would be (b), but if it neither show nor contain anything of that nature would not be (c), demurrable.

Of title to charges on land or rent. Sect. 40.

As regards charges on land, or rent, the time within which an acknowledgment of them is to be made is regulated by the sect. 40 of the 3 & 4 Will. 4, c. 27. By that provision no proceeding can be taken to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, but within twenty years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some acknowledgment of the right thereto is made.

(a) Vide supra, p. 684.

(c) *Baker v. Wetton*, 14 Sim.

(b) See *Vernon v. Vernon*, 2 Myl. & K. 245.

426.

The terms of this provision, as of the sect. 28, are clear that the twenty years are to be computed either from the time when a present right to the charge has accrued to a person capable of giving a discharge for or release of the charge, or from the making of an acknowledgment of it, or, if more than one, of the last of them; and the natural meaning of the words "in the mean time" in this provision, as of the same words in the sect. 28, would seem to be, some time during a period of twenty years computed from the time when such right accrued (*d*), and not at any time intermediate between the time of such accruer, and the commencement of the proceedings for the recovery of the charge. But it has been held that these words represent a period intermediate between the time when the present right accrued and the commencement of the action, and not a period intermediate between the former and the expiration of the twenty years mentioned in this provision, and that an acknowledgment of the charge made at any time within twenty years next before the bringing the action or suit will be sufficient to preserve the charge, whilst in the case of the land itself, and of a rent, as already shown, the acknowledgment of the title thereto must be made within that period next after the right first accrues (*e*).

In the case, also, of charges on land, as in the case of land itself, not only is the remedy for the recovery of the charge barred, but the right to the charge itself is extinguished (*f*), for a charge on land is an interest in land, and an interest in land, even of a chattel nature, is land within the meaning of the act (*g*).

Before time of
limitation ex-
pires.

In *Watson v. Birch* (*h*), Shadwell, V.-C., said, the

(*d*) See *Homan v. Andrews*, 1 Ir. C. R. 106, 116.

(*e*) *Harty v. Davis*, 13 Ir. L. R. 23; *Toft v. Stephenson*, 7 Hare, 1; 1 De G., M. & G. 28; 5 Ib. 735; *Latouche v. O'Brien*,

10 Ir. Eq. R. 113; *Clinton v. Brophy*, Ib. 139.

(*f*) Sect. 34, *supra*.

(*g*) Sect. 1.

(*h*) 15 Sim. 523, 524, 529.

intention of the legislature is, that no proceeding whatever shall be taken on a charge after the lapse of the period of limitation, unless an acknowledgment of the charge be made *within that period*.

Of title to advowsons will not preserve the right.

The statute 3 & 4 Will. 4, c. 27, makes no provision for the preservation of a right or title to advowsons by an acknowledgment in writing as in the cases of land and rent, and of charges thereon. The only mode of interrupting the period of limitation applied by this statute to advowsons is by the exercise of the right of presentation thereto by the rightful claimant, and the institution and induction of the clerk presented by him.

Of right to charges on them, or rent, &c., may be made at any time.

An acknowledgment of the right to a charge on a rent or an advowson, or to a legacy not charged on land (*i*), or of a right to the personal estate, or any share of the personal estate of an intestate (*j*), not being chattels real, or to arrears of rent or of interest for money charged on, or payable out of land or rent, or for any legacy, or for any damages in respect of such arrears (*k*), or to claims by specialty (*l*), may be made at any time, and as well after as before the expiration of the period of limitation (*m*), for the right to these matters respectively is not, as in the case of land and charges thereon, and of rent, extinguished after the determination of the periods of limitation applicable, but the remedy is only barred (*n*).

In the case of an obligation by simple contract, an acknowledgment made either before (*o*) or after (*p*) action brought, plea of the Statute of Limitations pleaded, and issue joined, will not prevent the operation of that statute.

(*i*) Sect. 40.

(*j*) 23 & 24 Vict. c. 88, s. 18.

(*k*) Sect. 42; 3 & 4 Will. 4, c. 27.

(*l*) 3 & 4 Will. 4, c. 42; *Moodie v. Bannister*, 4 Drew. 432.

(*m*) *Perham v. Raynal*, 2 Bing. 306.

(*n*) *Harty v. Davis*, 18 Ir. L. R. 23.

(*o*) *Tanner v. Smart*, 6 B. & C. 602.

(*p*) *Bateman v. Finder*, 3 Q. B. 574.

SECTION VI.

Determining the Time when an Acknowledgment is made.

Inasmuch as after the expiration of the several periods Date. of limitation applicable to land, rent and advowsons, all title and right thereto are extinguished (*q*), and as an acknowledgment of such title and right to land and to rent, is to be given, as already shown, before the expiration of the period of limitation, the determination of the exact time of making the acknowledgment may be important.

When an instrument has a date, the date is *prima facie*, but not conclusive, evidence of the instrument having been made at that date (*r*).

In some instances in bankruptcy an exception arises (*s*). In *Potez v. Glossop*, Parke, B., said, it is a difficult matter to support the cases of *Sinclair v. Baggaley* and *Anderson v. Weston*; and yet, at the same time, it is an equally difficult matter not to be bound by them, and that he felt great difficulty in seeing the reason of that exception.

None of the Statutes of Limitation requires any acknowledgment to be dated (*t*). But in those cases Evidence of time of giving when not dated. where the acknowledgment must be made within the period of limitation, the absence of a date to an acknowledgment may render the proof of the time when it was

(*q*) Chap. VI.

(*r*) *Anderson v. Weston*, 6 Bing. N. C. 296, 300; *Sinclair v. Baggaley*, 4 M. & W. 812, 818; *Potez v. Glossop*, 2 Ex. 191; *Malpas v. Clements*, 19 L. J., Q. B. 485; *Morgan v. Whitmore*, 6 Ex. 716. But see the judgment of

Parke, B., in *Potez v. Glossop*, and of Pollock, C.B., 6 Ex. 720; *Raffell v. Raffell* (a will), 12 Jur., N. S. 910; *In the goods of Allchin* (a will), L. R., 1 P. & D. 664.

(*s*) *Anderson v. Weston*, supra.

(*t*) *Hartley v. Wharton*, 11 Ad. & E. 934.

actually given essentially necessary (*u*), and such proof may be furnished by extrinsic evidence (*x*).

Delivery.

An acknowledgment, however, may be dated on one day and not be given or delivered to the person to whom it is made until long after. In such case the acknowledgment will operate as such, not from the date of it but from such delivery (*y*).

When by deed.

If an acknowledgment be by deed the date of the deed may be long before the delivery of it by the person making the acknowledgment; and as it may be dated on one day and delivered on another, or dated on an impossible day (*z*), and as it may be pleaded as delivered after (*a*), but not before (*b*), the effect of the deed as an acknowledgment will be from the delivery (*c*), and the day of the delivery will be the day of the date (*d*), and the time of such delivery may be shown by extrinsic evidence (*e*).

SECTION VII.

The Effect of an Acknowledgment.

In general.

The effect, in general, of an acknowledgment is, or may be, sometimes to preserve the right, sometimes to revive or restore the remedy and enable a claimant to enforce his right, and sometimes ineffectual to revive or restore the right.

May be a new

Another effect of an acknowledgment in the manner

(*u*) See *Gregson v. Hindley*, 10 Jur. 888.

(*x*) *Hartley v. Wharton*, *supra*.

(*y*) *Jayne v. Hughes*, 10 Ex. 480.

(*z*) *Cromwell v. Grimsden*, 2 Salk. 463.

(*a*) Perk. ss. 149, 150; *Stone v. Ball*, 3 Lev. 848; *Hall v. Cazo-*

nove, 4 East, 477; *Browne v. Burton*, 17 L. J., N. S., Q. B. 49; *Jayne v. Hughes*, 10 Ex. 480.

(*b*) Br. Faits, pl. 28, pl. 99, *contra*.

(*c*) *Jayne v. Hughes*, *supra*.

(*d*) *Armit v. Breame*, 1 Salk. 76.

(*e*) *Jayne v. Hughes*, *supra*.

prescribed, is to establish a new terminus from which the period of limitation applicable is to be computed, and, so *toties quoties*, as an acknowledgment may be made (*f*). terminus of limitation.

As respects the time of making, the effect of an acknowledgment made before, and of one made after, the expiration of the period of limitation, varies with the subject to which the Statutes of Limitation are applied. Effect when made before, and when after, the time of limitation is expired.

An acknowledgment made before the period of limitation has expired, interrupts the period, but, as respects claims by simple contract and by specialty made after the expiration, destroys or removes the limitation (*g*); whilst as respects land and charges thereon and rent, an acknowledgment cannot destroy or remove the limitation, because the right and title thereto are extinguished after the period of limitation has expired (*h*).

The Statute of Fines (*i*), after the expiration of the time after levying a fine for asserting a claim, extinguished the right of the claimant, and therefore the mere recognition or admission of it made after such expiration had not the effect of reviving or restoring the right.

Thus where an entry to avoid a fine before the five years elapsed was made by a stranger in the name of, but without any precedent authority by, the person having the right, but who after the five years ratified such entry, the ratification was held to be inoperative (*k*). So an acknowledgment of the title to land or to a charge thereon, or to a rent, made in the same way before, but not ratified until after the expiration of the period of limitation, would be equally inoperative.

(*f*) See *Scott v. Nisw*, 2 Con. & L. 185, 191, 3 Dru. & War. 388, 404, *S. C.*; *Burroughs v. M'Creight*, 1 Jones & Lat. 290, 304.

(*g*) See Poth., by Evans, 462, 463, 465.

(*h*) Vide ante, Sect. V. of this Chap.

(*i*) 4 Hen. 7, c. 24.

(*k*) *Lord Audley's case*, Cro. Eliz. 561; Moore, 457; Poph., cit. and approved by Lord Coke in *Margaret Podger's case*, 9 Rep. 104 a. See 4 Ex. 799; *Bird v. Brown*, 4 Ex. 786, *S. P.*

Even in the case of mere personal rights, independent of their affecting any land or any interest therein, or any rent, the effect would be the same. For if, said Lord Ellenborough (*l*), speaking of personal actions, the Statutes of Limitation extinguish the right, the remedy could not be revived by a subsequent promise.

The Irish Statute of Limitations (*m*), as to the redemption of mortgages, and as to judgment debts, after the expiration of the period of limitation also extinguished the right, and therefore a mere admission or recognition of the right made after such expiration had not the effect of reviving or restoring the right (*n*).

None of the other Statutes of Limitation, either in England or Ireland, had an effect corresponding to that of the statutes just noticed, but merely suspended the remedy and left the right unaffected, and consequently the mere recognition or admission of it at any period, after the expiration of the period of limitation, had the effect of restoring the remedy and enabled the claimant to assert his right, whether it was to real property or to personal (*o*).

Since 3 & 4
Will. 4, c. 27,
as to land.

The 3 & 4 Will. 4, c. 27, however, as already shown (*p*), not only bars the remedy but extinguishes the right and title of a claimant who does not assert them before the period of limitation applicable has expired (*q*), and a conveyance by the claimant after that period has expired would be, as a transfer of the property, without any operation (*r*).

The right and title of a claimant of land, therefore, being extinguished after the expiration of the period of limitation, cannot be revived by a mere acknowledgment

(*l*) 18 East, 450.

(*m*) 8 Geo. 1, c. 4.

(*n*) *Brady v. Fitzgibbon*, 1 Jebb & S. 508; *Waring v. Waring*, 5 Ir. C. R. 6; *Kemmis v. Macdonlin*, 11 Ib. 872; *Cloncurry v. Piers*, 9 Ir. Eq. R. 407; *Morrough v. Power*, 5 Ir. L. R. 494; *Maddock v. Bond*, Ir. T. R. 382.

(*o*) *Davenport v. Tyrrel*, 1 W. Bl. 875; *Coop.* 170; *Hunt v. Bourns*, 2 Salk. 422; 13 East, 450; *Higgins v. Scott*, 2 B. & Ad. 413.

(*p*) Vide ante, Chap. VI.

(*q*) Sect. 34.

(*r*) See 17 Q. B. 372.

made after that expiration. Therefore a present recognition of a right or title to land or rent which has existed more than twenty years before the recognition is made, but not recognized within that time, is not such an acknowledgment as will satisfy the requisites of the 14th sect. of the 3 & 4 Will. 4, c. 27 (*s*).

It may be doubted whether the mere delivery of the possession by the possessor to the person whose title has been extinguished will be sufficient to divest the title of the possessor acquired by such possessor, and revest the property in such person. A mere constructive delivery of the possession will not have that effect (*t*). Either a feoffment, of which, although accompanied by a deed, the essential and operative part is the livery of seisin, and which until the 7 & 8 Vict. c. 76, might be evidenced by a mere writing signed by the feoffor, but since that statute must be evidenced by deed, or some other instrument adapted to convey the property, would seem to be the only effectual mode of divesting the title of the one and revesting it in the other.

Whether by
mere delivery
of possession.

The payment by a tenant for life of an equity of redemption, or the admission in writing of such tenant of the payment of part of the mortgage money or of interest thereon (*u*), after the lapse of twenty years, without any such payment or acknowledgment, will not deprive the remainderman of the benefit of the statute, or, in other words, will not revive against him the right of the mortgagee (*x*).

Right of mort-
gagees.

As an acknowledgment under the section 14 of the 3 & 4 Will. 4, c. 27, of a title to a rent must, as in the case of land, be made before the period of limitation applicable has expired (*y*), and as the right and title to

As to rents.

(*s*) *Hobson v. Burns*, 13 Ir. L. R. 286.

(*t*) *Jacob v. Walsh*, 4 Ir. L. R. 254.

(*u*) 1 Vict. c. 28.

(*x*) *Gregson v. Hindley*, 10 Jur. 383. See also *Seager v. Aston*, 8 Jur., N. S. 484; *Fordham v. Wallis*, 10 Hare, 217.

(*y*) Vide *supra*, p. 570.

the rent when it is not received during that period, and all arrears of it (*x*), are extinguished (*a*), and since, in general, a rent can be created by deed only, a mere acknowledgment made after that period has expired will not have the effect of reviving or restoring such title.

If, said Coleridge, J. (*b*), after nonpayment of a rent for twenty years, a series of fresh payments were made, might not the old rent be said to exist without a fresh grant?

Extinct, re-
stored by only
new grant,
express or pre-
sumed.

The only mode, however, in which the rent can be restored would seem to be, either by an express re-grant by deed, or by the uninterrupted receipt of a corresponding rent for a period of twenty years uncontradicted and unexplained, from which receipt a grant of such rent might be presumed (*c*). The practical effect of this presumption is shown by the decision in *Read v. Brookman* (*d*), that it was competent to plead a right to an incorporeal hereditament by deed, and excuse profer of the deed by alleging it to have been lost by time and accident. A usual mode of claiming title to an incorporeal hereditament therefore was to allege a feigned grant within the time of legal memory, from some owner of the land or other person capable of making one, to some tenant or person capable of receiving it, setting forth the names of the supposed parties to the document (*e*), with the excuse for profer that the document had been lost by time and accident. On a traverse of the grant, the uninterrupted usage of the right for twenty years was held cogent evidence of the existence of the grant. This was termed making title by "non-existing grant" (*f*).

(*z*) *James v. Salter*, 3 Bing. N. C. 544.

(*a*) Sect. 34.

(*b*) *Hanks v. Palling*, 6 El. & B. 659, 668.

(*c*) See *Bealey v. Shaw*, 6 East, 208; *Balston v. Benstead*, 1 Camp. 463; *Wright v. Howard*, 1 Sim. &

S. 208; *Campbell v. Wilson*, 8 East, 294; *Lord Guernsey v. Redbridges*, 1 Gilb. Eq. R. 4; *Bright v. Walker*, 1 C., M. & R. 217.

(*d*) 3 T. R. 151.

(*e*) *Hendy v. Stevenson*, 10 East, 55.

(*f*) Best's Princ. of Ev. s. 377.

Loss of a deed or instrument is, unquestionably, a ground upon which a court of equity will exercise jurisdiction; but has always exercised it with great caution and under great guards; for the court has required that the bill of the plaintiff shall be accompanied by an affidavit, in order to satisfy it that the case is one which it may safely entertain (*g*). If, said Lord Eldon (*h*), an ejectment were now brought upon a devise contained in a lost will, considering the extent to which courts of law have proceeded in assuming jurisdiction where *profert* cannot be made, I am not quite sure whether they would not go further to relieve than they would have done half a century ago. Lord Hardwicke has recorded his opinion that the time had not and never would come, when a court of law could venture to dispense with *profert*, upon the alleged loss of an instrument: yet that principle is altered. The legislature has now abolished both *profert* and *oyer* in pleadings in courts of common law (*i*). The concurrent jurisdiction of equity, in cases of this sort, however, is not affected (*k*).

A rent claimed by virtue of a lost grant would be, *primâ facie*, a rent-seck, and the remedy for the recovery of such a rent may be here considered. Remedies for rents-seck.

At common law, a rent with a power to distrain for it may be claimed by prescription (*l*), but is excepted out of the Prescription Act (*m*). At law.

At common law, until the reign of George the Second, a freehold rent-seck issuing out of land, created either by will or by deed, was, until seisin—which created the remedy—given by the terre-tenant, who in law is the tenant of the freehold, and not by a tenant for years only, remediless. After seisin in law of such

(*g*) See *Whitchurch v. Golding*, 2 P. W. 541; 3 Atk. 182; *Hook v. Dorman*, 1 Sim. & S. 227; *Barker v. Ray*, 2 Russ. 63, 73.

(*h*) *Barker v. Ray*, *supra*.

(*i*) 15 & 16 Vict. c. 76, s. 55.

(*k*) See *Atkinson v. Leonard*, 3 B. C. C. 218.

(*l*) Co. Litt. 114 a, 144 a.

(*m*) 2 & 3 Will. 4, c. 71.

a rent an avowry, and after seisin in deed an assise, might be maintained for it (*l*). When created by deed without any covenant for payment, the rent might be recovered by a writ of annuity (*m*), but if so recovered it could not afterwards be recovered by assise, and *vice versa* (*n*).

After 4 Geo. 2,
c. 28.

In the reign of George the Second the remedy by distress was given for the recovery of such rents (*o*). But in the reign of William the Fourth (*p*), the remedy by writ of assise or other real action was abolished.

Whether by
action of
debt.

An action of debt for such a rent, during its continuance, whether created by will (*q*), or by a mere grant (*r*), could not formerly (*s*), not even after the statute of 8 Anne, c. 14, for that statute applies as between lessor and lessee only (*t*), and cannot now, notwithstanding the Common Law Procedure Act, 1852 (*u*), be maintained, because, in general, except by a writ of annuity (*x*), the law will not permit a real injury to be remedied by an action merely personal (*y*).

In *Varley v. Leigh* (*z*), Pollock, C. B., however, expressed an opinion that there must be a remedy at law for such a rent in lieu of the writ of assise now abolished, and that an action of debt would be the proper remedy; but Rolfe, B., dissented from that view, and expressed himself dissatisfied with the argu-

(*l*) Litt. ss. 217, 218, 233, 235, 341; *Bevil's case*, 4 Co. 8 a.; *Brediman's case*, 6 Ib. 56 b.

(*m*) F. N. B. 356; Co. Litt. 144 b.

(*n*) Litt. s. 219; Co. Litt. 144 b.

(*o*) 4 Geo. 2, c. 28, s. 5; *Bradbury v. Wright*, 1 Doug. 625; Willes, 508; *Seward v. Anstey*, 2 Bing. 519; *Buttery v. Robinson*, 3 Ib. 392.

(*p*) 3 & 4 Will. 4, c. 27, ss. 36, 37, 38.

(*q*) *Webb v. Jiggs*, 4 M. & S. 118.

(*r*) *Kelly v. Clubbe*, 3 Brod. & Bing. 130; *Butler v. Rutledge*, Arm., M. & O. Ir. Rep. 390.

(*s*) 1 Roll. Ab. 595; F. N. B. 280 H., 281 F.; *Oguel's case*, 4 Co. 48; *Lillingston's case*, 7 Ib. 37; *Randall v. Rigby*, 4 M. & W. 130.

(*t*) *Webb v. Jiggs*, *supra*.

(*u*) 15 & 16 Vict. c. 76; Bullen & L. Prec. in Plead. 28, 49.

(*x*) F. N. B. 152.

(*y*) 3 Bl. Com. 232. See 4 M. & S. 114.

(*z*) 2 Ex. 446; 17 L. J., Ex. 289, *S. C.*

ments urged in support of it. If the writ of assise had been the only remedy (*a*), the law would have supplied another, and perhaps the one by action of debt. But, besides the remedies in equity (*b*), the remedies by distress, and, where applicable, by writ of annuity (*c*), or, since the Common Law Procedure Act, 1852, just noticed, by writ of summons, still remain, and the reason for not permitting in such cases a personal action, with the exception just mentioned of a satisfactory reason, would still be applicable; so that the remedy by action of debt is not necessarily required by reason of the abolition of the writ of assise.

The only remedy at law now, for such a rent when created by deed, and not secured by bond or by covenant, is either by distress or by writ of annuity (*d*), or, since the Common Law Procedure Act, 1852, by a writ of summons in lieu of a writ of annuity as a personal action; but, when created by will (*e*), is by distress only. When created, however, by the former mode the effect of proceeding by one of such remedies would still seem to be to exclude the exercise afterwards of the other (*f*).

When by distress, or writ of annuity,

Where a rent-seck is also secured by the covenant of the grantor, the grantee may maintain for it an action of either covenant (*g*), unless the covenant be a mere collateral one (*h*), or debt (*i*). —covenant or debt.

A rent-seck for life granted out of chattels real (*j*), or for years out of freehold lands (*k*), is a chattel only, Issuing out of chattels real.

(*a*) See *Lillingston's case*, 7 Co. 87. Ex. 56.

(*b*) Vide post.

(*c*) F. N. B. 152.

(*d*) Ib.

(*e*) *Saward v. Anstey*, 2 Bing. 519; *Buttery v. Robinson*, 3 Ib. 392.

(*f*) See Litt. s. 219; Co. Litt. 144 b.

(*g*) *Paget v. Foley*, 8 Bing. N. C. 679; *Manning v. Phelps*, 11

(*h*) *Randall v. Rigby*, 4 M. & W. 130.

(*i*) *Varley v. Leigh*, 2 Ib. 446; 17 L. J., Ex. 289, S. C.

(*j*) *Butt's case*, 7 Co. 28; Co. Litt. 147 b. See also *Kelly v. Clubbe*, 3 Brod. & B. 130; *James v. Salter*, 2 Bing. N. C. 505; 3 Ib. 544; *Paget v. Foley*, 2 Ib. 679.

(*k*) *Brendloss v. Philips*, Cro. Eliz. 895.

and consequently might be recovered by action of debt (*l*). But unless the rent appear to be issuing out of chattels real the grantor of it was taken to have a fee in the lands charged, and then the grantee's taking a freehold is a bar to such an action (*m*). For an annuity properly so called, that is, a yearly payment charging the person only of the grantor (*n*), a writ of annuity, and not an action of debt, during the existence of the annuity, was formerly the proper remedy (*o*). Since the Common Law Procedure Act, 1852 (*p*), however, all personal actions are commenced by writ of summons, and a plaintiff need not specify the form of action he uses, and causes of action of whatever kind, except replevin or ejectment, may be joined in the same suit (*q*).

In equity.

In general the remedies for a rent given by the instrument creating it must be relied on by the grantee (*r*); and mere difficulty in pursuing them at law is not sufficient to enable him to recover the rent in equity (*s*).

In certain cases, however, as where the land out of which the rent issues (*t*), or the nature of the rent (*u*), is uncertain, or where there are no demesne lands on which to distrain (*x*), or where there is or may be nothing upon the land to distrain (*y*), or where the pro-

(*l*) See Plowd. 26; *Brendloss v. Philips*, supra; *Lucas v. Fulwood*, Bulst. 151.

(*m*) *Kelly v. Clubbe*, supra.

(*n*) F. N. B. 152 a; Co. Litt. 144 b.

(*o*) *Browne v. Pendlebury*, Cro. Eliz. 268 (4); *Tanfield's case*, Ib. 8 (7); *Lucas v. Fulwood*, Bulst. 151.

(*p*) 15 & 16 Vict. c. 76.

(*q*) Bull. & L. Prec. Plead. 28, 49.

(*r*) 1 Fonb. Eq. b. i. c. iii. s. 8; *Roberts v. Hughes*, Beatty, 417.

(*s*) *Brady v. Fitzgerald*, 12 Ir. Eq. Cas. 273; *Cremen v. Hawkins*,

8 Ib. 153, 503; *Stevell v. Murphy*, 2 Ib. 448.

(*t*) *Eaton College v. Beauchamp*, 1 C. C. 121; *Duke of Bridgewater v. Edwards*, 4 B. P. C. 139; *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. Ca. 251.

(*u*) *Collett v. Jaques*, 1 C. C. 120; *Benson v. Baldwin*, 1 Atk. 598; *Cox v. Foley*, 1 Vern. 359; *Bouveris v. Prentice*, 1 Bro. C. C. 200; *Archbishop of Dublin v. Lord Trimleston*, supra.

(*x*) *Duke of Leeds v. Powell*, 1 Ves. 170, 171.

(*y*) *White v. Smale*, 22 Beav. 72; *White v. James*, 26 Ib. 191.

perty charged is of an incorporeal nature (*z*), or the origin of the title to the rent be unknown, or it be doubtful whether there be any remedy at law, or, if any, whether it be practically available (*a*), or the legal remedies have been rendered useless or difficult to be exercised (*b*), or the owner of the rent has been deprived of his remedy or some of his remedies at law (*c*), or the remedy at law fails, as being neither so complete nor so effectual as that in equity (*d*), or where the remedy in equity is the only means by which the property can be made available (*e*), or where the rent has been paid without question for a very great length of time and the difficulty of obtaining relief at law would be almost insurmountable (*f*), or where proceedings by the owner of the lands charged are calculated to confuse and complicate the title of the owner of the rent (*g*), or if the remedy be defeated by fraud (*h*), or, generally, be rendered defective or insufficient by any of those contingencies which occasionally obstruct the fair operation of contracts (*i*), the rent will be recoverable in equity, and be raised by a sale or mortgage of the property charged (*k*).

In *Roberts v. Hughes* (*l*), the court, alluding to *Cupit v. Jackson* as inconsistent with former cases, said, there

(*z*) *Thorndike v. Allington*, 1 C. C. 79; *Berkley v. Earl of Salisbury*, cit. 2 Bro. C. R. 518.

(*a*) *Archbishop of Dublin v. Lord Trimleston*, supra.

(*b*) *Brady v. Fitzgerald*, 12 Ir. Eq. Cas. 273; *White v. Smale*, 22 Beav. 72; *White v. James*, 26 Ib. 191; *Stevelly v. Murphy*, 2 Ir. Eq. Ca. 448.

(*c*) *Roberts v. Hughes*, Beatty, 417.

(*d*) *Cupit v. Jackson*, 13 Pri. 721; *Manly v. Hawkins*, 1 Dru. & Wal. 363; *Fay v. Jones*, 2 Jones, Ir. Ex. R. 860; *White v. James*, 26 Beav. 191; *Hall v. Hurt*, 2 J.

& H. 76. On *Cupit v. Jackson*, see *Graves v. Hicks*, 11 Sim. 551; *Hall v. Hurt*, supra.

(*e*) *Hall v. Hurt*, supra.

(*f*) *Stevelly v. Murphy*, supra.

(*g*) *Archbishop of Dublin v. Lord Trimleston*, 2 Dru. & War. 535; 12 Ir. Eq. Ca. 251.

(*h*) *Davy v. Davy*, 1 Ch. C. 147.

(*i*) *Roberts v. Hughes*, supra; *Brady v. Fitzgerald*, supra; *Cremen v. Hawkes*, 8 Ir. Eq. Ca. 153, 508.

(*k*) *Cupit v. Jackson*, 13 Pri. 721; *Hall v. Hurt*, 2 J. & H. 76.

(*l*) Beatty, 417.

is more reason to doubt the accuracy of the reporter than to suppose the judgment intended to overrule former cases. This observation, however, would seem to be directed to the fact that the rent was a rent-charge for which the remedies provided by the deed creating it were a power of distress, and a power to enter on the lands charged and to receive the rents until satisfied the arrears, and not to the case as an authority for the general principle on which courts of equity afford relief in the cases just specified.

For whom remedy in equity available.

The remedy in equity is available not only for the executors of the grantee after his death for arrears accrued in his lifetime (*o*), but also for the grantee himself during his life for the arrears accruing to him, although the property charged be limited, subject to the charge, to a person for life with remainders over (*p*).

In *Graves v. Hicks* (*q*) indeed Shadwell, V.-C., said, that where the grantee is living and the property charged is limited for life with remainders over, unless a sale be necessary for some other purpose, the arrears will not be so raised. But in *Hall v. Hurt* (*r*), Wood, V.-C., held, that if a sale be the only means by which the property can be made available for satisfying the arrears, they will be so raised during the life of the grantee, although the property be so limited.

When after rent extinct it may be revived by acknowledgment.

If a rent be paid by the owner of the land out of which it issues to a person claiming and receiving it wrongfully for twenty years and upwards, the right of the rightful owner of the rent will be extinguished, but, being a mere right, may, perhaps, as between him and such a person be revived after the expiration of that period, either by the payment, or by a simple acknowledgment, made to such owner.

(*o*) *Cupit v. Jackson*, *supra*.
See also *Graves v. Hicks*, 11 Sim.
526.

(*p*) *Hall v. Hurt*, 2 J. & H. 76.
(*q*) 11 Sim. 526, 551.
(*r*) *Supra*.

This enactment, however, extends to only land, rent and advowsons, and also, by interpretation, to charges on land which are an interest in land, and therefore land within the act(s), but not to charges on rent or advowsons, although charges on rent are within the sect. 40.

As to charges on rent, and advowsons.

It may be here observed that where there is in the grant of an annuity for life an express covenant for the payment of it, although the annuity, as a charge on the land, may be extinguished, yet the remedy for it on the covenant may be still enforced (t).

When, after rent extinct, personal remedy may be enforced.

The effect of an acknowledgment of the title of a mortgagor, or of his right of redemption, and of a right to a charge on land, when made after the expiration of the period of limitation applicable, would seem to be the same as in the case of land or rent.

Right of redemption.

A charge on land which, on the passing of the 3 & 4 Will. 4, c. 27, had been extinguished, cannot be revived by a mere acknowledgment made since that statute was passed. Thus where a judgment in Ireland was, by the effect of the 8 Geo. 1, c. 4, extinguished when the former act was passed, an acknowledgment within twenty years after the passing was held not to revive such judgment(u); and it could not be revived by *sci. fa.* (x).

Charge on land extinct before 3 & 4 Will. 4, c. 27.

In *Kirkwood v. Lloyd* (y), the question arose what is the effect of payment of interest on a judgment after the lapse of twenty years, not as between the person paying and the person paid, but as between third parties and the person paid, and the court said that was a question of difficulty, and that there was no decision to show

Not so extinct.

(s) Sect. 1, 3 & 4 Will. 4, c. 27.

(t) *Manning v. Phelps*, 10 Ex. 59; 24 L. J., Ex. 62, S. C.

(u) *Morrrough v. Power*, Longf. & T. 644; *Brady v. Fitzgibbon*, 1 Jebb & S. 503; *Cloncurry v. Piers*,

9 Ir. Eq. R. 407; *Kemmis v. Macklin*, 11 Ib. 372.

(x) *Furran v. Boreasford*, 10 Cl. & F. 319.

(y) 12 Ir. Eq. R. 596.

what is the operation of such a payment after twenty years; and in *Harty v. Davis* (z), in the case of a judgment, and *Toft v. Stephenson* (a), in the case of a lien for unpaid purchase-money, the court held, as between the person paying and the person paid, that an acknowledgment made more than twenty years after a present right accrued, but within that time before the commencement of the action or suit, had the effect of reviving the charge; but in the former of these two cases, Ball, J., said, that the court decided the case only with respect to the effect of the acknowledgment on the rights of the person giving it, and that the decision was not intended to determine what would be the effect as against third parties.

By owners of
lands subject,
with others,
to a common
charge,

Whether where lands are subject to a common charge, and a person entitled to part of the land pays interest after the lapse of twenty years, having paid no interest in the interval, will revive the charge against either himself, or the owners of the other part of the lands, on the principle, that where two persons are jointly liable on a simple contract, payment of interest by one, after the expiration of six years, will be evidence of a new promise by both (b), has been doubted (c).

—of lands
subject to
trusts for in-
demnity.

Where, by the operation of the statute, lands, subject to a charge but sold with an indemnity upon lands not so subject against it, have ceased to be altogether liable to the charge, a beneficial owner of the indemnity lands cannot revive a demand against those other lands from which they were so discharged. That would be to make the conveyance of the indemnity lands a means of operating and not exonerating those other lands (d).

(z) 13 Ir. L. R. 23.

(a) 1 De G., M. & G. 28; 5 Ib. 735.

(b) See the cases collected in *Goddard v. Ingram*, 8 Q. B. 839.

(c) *Homan v. Andrews*, 1 Ir. C. R. 106.

(d) See *Homan v. Andrews*, supra.

Where there is no common charge nor liability, and the person making an acknowledgment can only be considered as the agent of the person whose estate is liable to the charge, the acknowledgment would not revive the charge against the lands from which they were discharged by the operation of the statute(*e*).

If, however, the interpretation of the sections 28 and 40 before noticed (*f*) be correct, the effect of an acknowledgment of the title of a mortgagor or of his right of redemption made at any time, even after the expiration of twenty years next after the time at which the mortgagee obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, but within twenty years before the commencement of the suit for redemption, is to revive or restore such title or right, and the effect of an acknowledgment of a right to a charge on land made at any time even after the expiration of twenty years next after a present right to receive the same has accrued, but within twenty years next before the commencement of proceedings to recover the charge, is to revive or restore the right to the charge.

The effect of an acknowledgment of a right to a charge on a rent, or an advowson, or to a legacy not charged on land (*g*), or of a right to the personal estate, or any share of the personal estate, of an intestate (*h*), not being chattels real, or to arrears of rent or of interest of money charged on, or payable out of land or rent, or for any legacy, or for any damages in respect of such arrears (*i*), or to claims by specialty (*k*), whenever made, will revive the right; for the right to these matters respectively is not, as in the case of land

(*e*) See *Homan v. Andrews*, 1 Ir. C. R. 106.

(*f*) Sect. VI. of this Chapter.

(*g*) Sect. 40.

(*h*) 23 & 24 Vict. c. 38, s. 13.

(*i*) 3 & 4 Will. 4, c. 27, s. 42.

(*k*) 3 & 4 Will. 4, c. 42. Vide ante, p. 581.

itself and charges thereon, and rent, extinguished after the determination of the periods of limitation, applied to such several matters, but the remedies for them are merely taken away (l).

SECTION VIII.

By whom the Question, whether a written Instrument be or be not an Acknowledgment, is to be determined.

The court, or the jury.

A writing, or several writings together, relied on as an acknowledgment within the Statutes of Limitation, may be such, or may have been made under such circumstances, as to involve the question whether such writing, or such several writings together, be or be not such an acknowledgment. The further question, whether the court or the jury is or are to determine the former one, also then arises.

When the court.

In general the construction of a written instrument is, in the first place, to be determined by the judge (m). Where the question arises on the construction of one document only, without reference to any extrinsic evidence to explain it, or where a legal right is to be determined from the construction of a written document, which either is unambiguous, or of which the ambiguity arises only from the words themselves, that is a question to be decided by the judge (n), and it is

(l) See *Harty v. Davis*, 18 Ir. L. R. 23.

(m) *Morrell v. Frith*, 3 M. & W. 402; 5 Ib. 542; *Routledge v. Ramsay*, 8 Ad. & E. 221; *Baildon v. Walton*, 1 Ex. 617; *Ley v. Peter*, 3 Ib. 111; 5 Ib. 153. See also *Foster v. Mentor Insurance Co.*, 3 Ell. & B. 48; *Furness*

v. Meek, 27 L. J., Ex. 34; *Smith v. Thorne*, 18 Q. B. 134; *Smith v. Thompson*, 8 C. B. 44; *Doe d. Curzon v. Edmonds*, 6 M. & W. 295; *Hutchinson v. Bowker*, 5 M. & W. 585.

(n) *Morrell v. Frith*, 3 M. & W. 402; *Smith v. Thorne*, 18 Q. B. 134; *Smith v. Thompson*, 8 C. B. 44.

not competent to him to ask the assistance of the jury in construing it (*o*). The safest course is to adhere to this rule (*p*).

In *Morrell v. Frith* (*q*), Parke, B., said, that in the case of an obscure and doubtful document, he had always acted on, but had always disapproved of, *Lloyd v. Maund* (*r*), and that the course he had taken was to express his own opinion, and then to take that of the jury, in order that, if they differed with him, the opinion of the court might be fairly taken on the question whether the document should be left to the jury, and that he thought that case is not law. In *Bucket v. Church* (*s*), the same judge said there was some little difficulty whether the effect of the writing, as an acknowledgment, was a question for the judge or the jury, and that he had always expressed his own opinion and taken that of the jury, and if they differed the court would decide (*t*).

The law regulating questions of this description was subsequently stated by the same judge in the following terms:—"The construction of all written documents belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury: and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the

(*o*) *Bolokov v. Seymour*, 17 C. B., N. S. 107, 116.

(*p*) 3 M. & W. 402.

(*q*) 3 M. & W. 402, 406.

(*r*) 2 T. R. 760.

(*s*) 9 Car. & P. 209.

(*t*) See also *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually" (*x*).

In accordance with these principles, the question whether a writing has or has not the effect of an acknowledgment of title within the section 14 of the 3 & 4 Will. 4, c. 27, has been determined to be, not for a jury but for the judge (*y*). Whether a writing has or has not the effect of an acknowledgment of title or right within the section 28, or of right within the sections 40 and 42 respectively of the same statute, would be to be determined in the same way.

When the jury.

The effect of a written document, however, is sometimes left to a jury. For instance, where the document requires parol evidence to qualify or to explain it, as in the ordinary case of mercantile contracts, in which peculiar terms and abbreviations are employed; or where the meaning of the words themselves is in question, being words that are used in a particular and technical sense, it is as if the documents were in a foreign language, and the truth or propriety of the translation were in question (*z*). And although the construction of a doubtful instrument be not for the determination of a jury, yet the facts by which it may be explained are (*a*).

Intention of parties.

The intention of the parties is a question for the jury, and in some cases, libel for instance, the meaning of the document is part of that intention, and therefore must be submitted to the jury (*b*).

(*x*) *Neilson v. Harford*, 8 M. & W. 806.

(*y*) *Doe d. Curzon v. Edmonds*, 6 M. & W. 291; *Ley v. Peters*, 3 Ex. 101, 111.

(*z*) 8 M. & W. 406; *Hutchinson v. Bowker*, 5 M. & W. 542;

Moore v. Garwood, 4 Ex. 681; *Furness v. Meek*, 27 L. J., Ex. 34;

Smith v. Thompson, 8 C. B. 44; *Smith v. Thorne*, 18 Q. B. 134.

(*a*) *Per Parke, B.*, 3 M. & W. 406.

(*b*) 3 M. & W. 402.

Where the contents of a writing containing an acknowledgment with other matters are divisible, and the signature of the person making the acknowledgment is placed under or opposite one portion only, the question whether the signature applies to the entire writing, or to only that one portion, is purely one of intention and must be for the jury (c).

Signature applicable to entire, or only part of, writing.

So where a written document or more than one are connected with other evidence (d), or where there is more than one such document, as in the case of a series of letters (e), the effect of such document or documents is to be submitted with the other evidence to the jury, and the effect of the series is to be determined by them under the direction of the judge (f).

Writing connected with other evidence, or more than one writing.

The precise time when an acknowledgment is either made by the person to make it, or given to the proper person, would be a question for the jury, and may be shown by oral testimony (g). The time of making an acknowledgment by payment may, in most cases, be easily ascertained, but an acknowledgment in writing may have been lost, and then its contents may be proved by such testimony (h), or it may be without a date, and the time of making or giving may be then so proved (i), or, in the case of a deed relied on as an acknowledgment, although dated is not delivered by the person who by it makes the acknowledgment until long after the date, the delivery by such person may also be so proved (k).

Time when acknowledgment is given.

Whether a document relied on as an acknowledgment—Whether be that given, or

(c) 3 Ell. & B. 71.

(d) *Bird v. Gammon*, 8 Bing. N. C. 883; *Power v. Barham*, 4 Ad. & E. 473; *Routledge v. Ramsay*, 8 Ad. & E. 222; *Bolckow v. Seymour*, 17 C. B., N. S. 107.

(e) *Dodson v. Mackay*, 4 Nev. & M. 827; *Morrell v. Frith*, 3 M. & W. 405; *The Incorporated Society v. Richards*, 1 Con. & L. 58.

(f) See also *Neilson v. Harford*, 8 M. & W. 806.

(g) *Hartley v. Wharton*, 11 Ad. & E. 984; *Jayne v. Hughes*, 10 Ex. 430.

(h) *Haydon v. Williams*, 7 Bing. 163.

(i) *Hartley v. Wharton*, supra.

(k) *Jayne v. Hughes*, supra.

the right be
that in ques-
tion.

ment be or be not the actual acknowledgment made (*l*), and whether the title or the right to which reference is made in an acknowledgment be or be not the title or the right in question (*m*), are questions to be determined by the jury.

SECTION IX.

What is a sufficient Acknowledgment within the Statutes of Limitation.

No specific
form neces-
sary.

No precise or specific form of acknowledgment in writing is in any case necessary. All that the 3 & 4 Will. 4, c. 27 (*n*), and the 3 & 4 Will. 4, c. 42 (*o*), require is that *some* acknowledgment of the right in the mode they prescribe shall be given, and therefore they allow considerable latitude in the form of the acknowledgment (*p*). The courts have put a liberal construction on the statutes which mean that the claim shall not be barred where the party has really acknowledged it (*q*). Consequently the acknowledgment, when in writing, may be by letter (*r*), a deed (*s*), an affidavit (*t*), the will of the party liable, either specifically (*u*), or by a devise of real estate for the payment of his debts, either primarily, or in aid of the personal estate, of such

(*l*) See *Rogers v. Hadley*, 2 H. & C. 327; *Bolckow v. Seymour*, 17 C. B., N. S. 107.

(*m*) *Frost v. Bengough*, 1 Bing. 266; *Smith v. Thorne*, 18 Q. B. 184.

(*n*) *Lord St. John v. Boughton*, 9 Sim. 919.

(*o*) *Moodie v. Bannister*, 4 Drew. 432.

(*p*) *Ib.*; *Carroll v. Darcy*, 10 Ir. Eq. Rep. 321.

(*q*) *Blair v. Nugent*, 9 Ir. Eq. Rep. 406.

(*r*) *Lord St. John v. Boughton*, *supra*; *Incorporated Society v. Richards*, 1 Con. & L. 58; *Holland v. Clark*, 1 You. & C. C. C.

151; *Vincent v. Wellington*, Long. & T. 456; *Burrows v. Gore*, 6 H. L. C. 907; *Jortin v. The South-Eastern Railway Co.* 2 S. & G. 48; 6 De G., M. & G. 270; *Toft v. Stephenson*, 1 Ib. 41; *Thompson v. Bowyer*, 9 Jur., N. S. 863; *Trulock v. Robey*, 12 Sim. 402; *Stansfield v. Hebeon*, 16 Beav. 236; 3 De G., M. & G. 620.

(*s*) *Jayne v. Hughes*, 10 Ex. 430.

(*t*) *Blair v. Nugent*, *supra*; *Tristram v. Harte*, Longf. & T. 186.

(*u*) *Millington v. Thompson*, 3 Ir. C. R. 236.

of them at least as at his death are not barred by the Statute of Limitations (*x*).

A correspondence between two parties who are dealing with each other, the one claiming a right to property, and the other an incumbrance upon it, would not amount to an acknowledgment of title to the property, because there might be an infirmity in the title acknowledged, which would give a third person a title against one or both of them. But if the correspondence be between the incumbrancer and such claimant, in the character of owner, for the redemption of the estate by payment of the incumbrance, the former cannot set up a title adverse to the latter, and the correspondence would be an acknowledgment of the title of the latter (*y*).

The acknowledgment in the case of land, or of rent, or of a charge thereon, must be of the title of the claimant thereto (*z*), that is, of some particular person, and not doubtful whether of the title of one person or of another (*a*); and must contain something more than a mere statement of fact, or of a past transaction (*b*), and if given under, or as in contemplation of, a bargain which is not concluded, the bargain must be final (*c*).

The acknowledgment of a title to land or rent, or to any charge thereon, must also be of a present existing title, and not of a title which has been extinguished by the lapse of the period of limitation (*d*); and should contain, either expressly (*e*), or by necessary inference, a reference to the claim to which it relates (*f*).

Must be of the claimant's title; 3 & 4 Will. 4, c. 27, s. 14;

—and as existing and refer to it.

(*x*) *Fergus v. Gore*, 1 Sch. & L. 107; *Burke v. Jones*, 2 Ves. & B. 275; *Jones v. Scott*, 1 Russ. & M. 255.

(*y*) *Incorporated Society v. Richards*, 1 Con. & L. 58.

(*z*) 3 & 4 Will. 4, c. 27, ss. 14, 24.

(*a*) *Hobson v. Burns*, 13 Ir. L. R. 286; *Thompson v. Bowyer*, 9 Jur., N. S. 863; 11 W. R. 975; 9 L. T. R., N. S. 12, S. C.; post, p. 662.

(*b*) *Hobson v. Burns*, supra.

(*c*) *Doe d. Curzon v. Edwards*,

6 M. & W. 291.

(*d*) 3 & 4 Will. 4, c. 27, ss. 2, 14, 24, 40; *Kemmis v. Macklin*, 11 Ir. L. R. 372; *Morrogh v. Power*, 5 Ib. 494; *Maddock v. Bond*, Ir. T. R. 382; *Cloncurry v. Piers*, 9 Ir. Eq. R. 407; *Hobson v. Burns*, 13 Ir. L. R. 286; *Howcutt v. Bonsor*, 8 Ex. 491.

(*e*) *Lord St. John v. Boughton*, 9 Sim. 219; *Holland v. Clark*, 1 Y. & C. C. C. 151.

(*f*) *Aroher v. Leonard*, 15 Ir.

None if right denied.

If a writing relied upon as an acknowledgment contain a positive and unqualified denial of any right by any person there will be no acknowledgment (*g*).

In cases of pecuniary claims.

In cases of pecuniary claim the amount of the claim need not be stated in the acknowledgment (*h*), but may be shown by extrinsic parol evidence (*i*). But the acknowledgment, when it is by an account stated (*j*), must show that there is a certain amount due (*k*).

Answer in Chancery.

An answer to a bill in Chancery filed by the claimant against the party liable (*l*), signed and sworn, may be said to be indisputable evidence of consent by such person, and, considering that it is a deliberate act, is entitled to more weight than if the acknowledgment had been given without deliberation.

Where the defendant by his answers acknowledged that he held under an agreement for a lease, and that the residue of the term had been assigned to the plaintiff and another person, that was an admission by the defendant that he held as tenant from year to year, and a distinct acknowledgment that the legal estate was in such assignees, and being in answer to questions put by the plaintiff is "given to the person entitled" within the section 14 of 3 & 4 Will. 4, c. 27 (*m*).

Schedule of insolvent debtor.

Whether the schedule by an insolvent debtor can, under any circumstances, amount to an acknowledgment

Ch. Rep. 267; *Vincent v. Wellington*, Long. & T. 456; *Incorporated Society v. Richards*, 1 Con. & L. 58.

(*g*) *Thompson v. Bowyer*, *supra*.
(*h*) *Bird v. Gammon*, 3 Bing. N. C. 888; *Lord St. John v. Boughton*, 9 Sim. 219; *Lechmere v. Fletcher*, 1 C. & M. 623; 3 Ex. 496; *Waller v. Lacy*, 1 Scott, N. R. 186; 1 M. & G. 54, S. C.; *Cheslyn v. Dalby*, 4 You. & C. 538; *Carroll v. Daroy*, 10 Ir. Eq. R. 321.

(*i*) *Waller v. Lacy*, *supra*; *Williams v. Griffiths*, 3 Ex. 385;

Gardner v. McMahon, 3 Q. B. 561; *Hartley v. Wharton*, 11 Ad. & E. 934.

(*j*) *Vide ante*, Sect. I. of this Chapter.

(*k*) *Per Parke, B.*, 5 M. & W. 667.

(*l*) *Blair v. Nugent*, *supra*; *Baildon v. Walton*, 1 Ex. 617; 3 Ex. 129; *Moodie v. Bannister*, *supra*; *Goode v. Job*, 1 Ellis & E. 6.

(*m*) *Goode v. Job*, 1 Ellis & E. 6; 28 L. J., Q. B. 1; 5 Jur., N. S. 145, S. C.

of title under the section 14 of the 3 & 4 Will. 4, c. 27, has been doubted (*n*). The acknowledgment relied upon in that case was such a schedule, but it was held insufficient on the grounds that it was not of the title of any particular person, or of any existing title.

As the effect of an acknowledgment of the title to land or to rent under the section 14 of this last statute is to put an end to all presumption arising from length of possession (*o*), and as from the time when the acknowledgment is given a new adverse possession or receipt arises, fresh acknowledgments or other subsequent acts, as receipts, must be made or done to avoid such possession or receipt (*p*). But mere verbal admissions by persons in possession that they hold as tenants will not estop them from setting up the statute (*q*).

When acknowledgment to be repeated.

The admission in writing under the section 42 of the 3 & 4 Will. 4, c. 27, by the person liable for arrears of rent of land to the agent of the claimant of the land of rent being due, would be an acknowledgment of the title of the claimant to the land (*r*).

Admission in writing of arrears of rent.

An acknowledgment by payment of rent must be made by the person making it in respect of the land or rent which is claimed,—*Quicquid solvitur, solvitur secundum animum solventis*,—and not on another account (*s*). If no proof of an actual demise, or of the person paying having been let into possession by the person to whom the payment was made, can be given, the person paying may show the payment to have been made either by mistake or by misrepresentation (*t*). But

By payment of rent.

(*n*) *Hobson v. Burns*, 13 Ir. L. R. 286.

(*o*) 1 Con. & L. 84.

(*p*) 2 Ib. 192.

(*q*) *Kirkwood v. Lloyd*, 12 Ir. E. R. 599.

(*r*) See *Furdon v. Clogg*, 10 M. & W. 572.

(*s*) *Att.-General v. Stephens*, 6 De G., M. & G. 111. See also *Kirkwood v. Lloyd*, 12 Ir. E. R. 585, 600.

(*t*) See *Fenner v. Duplock*, 2 Bing. 10; *Rogers v. Pitcher*, 6 Taunt. 202; *Doe d. Harcey v. Francis*, 2 M. & Rob. 57; *Brook*

without showing some special reason the payment will be conclusive (*u*).

Receipt of rents by equitable mortgagee in possession.

The receipt of the rents of an estate subject to an equitable mortgage by the mortgagee entering into possession, ought, said Shadwell, V.-C., *prima facie* to be taken as a *payment*, either of principal or interest of his debt as the case may be (*x*). If so, the effect would be to preserve, as a simple contract debt, the money due on the mortgage, *ultra* the value of the estate, as a claim against the general assets of the mortgagor (*y*).

Unnecessary under sect. 14 of c. 27 in cases within sect. 15.

No acknowledgment is necessary under the section 14 of the 3 & 4 Will. 4, c. 27, in those cases which are within the section 15, as in cases between a mortgagor and a mortgagee (*z*).

Of equity of redemption;

In the case of an acknowledgment under the section 28 of the 3 & 4 Will. 4, c. 27, the mere admission of holding under a mortgage title is not sufficient. What is required is, not an admission that the holding is under such a title, but an admission that some person has a right to redeem (*a*).

—to an agent;

Such an acknowledgment, when given to an agent, need not contain the name of the principal, and the person giving the acknowledgment need not know who is the principal. If the acknowledgment can be understood as acknowledging a title to redeem in the person or persons on whose behalf it is given, that will be sufficient (*b*).

v. Biggs, 2 Bing. N. C. 272; judgment of Patteson, J., *Hall v. Butler*, 2 P. & D. 374; 10 Ad. & E. 274; *Claridge v. M'Kensie*, 4 Scott, N. R. 796, 4 M. & G. 143, *S. C.*, *S. P.*; *Doe d. Plevin v. Brown*, 7 Ad. & E. 447; *Doe d. Higinbotham v. Barton*, 11 Ad. & E. 307; *Knight v. Cox*, 18 C. B. 645.

(*) See *Cooper v. Blandy*, 1 Bing. N. C. 45; *Marlow v. Wiggins*, 4 Q. B. 367.

(*x*) *Brocklehurst v. Jessop*, 7 Sim. 438.

(*y*) *S. C.* On this case, see *Fordham v. Wallis*, 10 Hare, 217.

(*z*) *Doe d. Jones v. Williams*, 5 Ad. & E. 291.

(*a*) *Thompson v. Bowyer*, 9 Jur., N. S. 863, 11 W. R. 975, 9 L. T. R. 12, *S. C.*

(*b*) *Stansfield v. Hobson*, 16 Beav. 236. On appeal, 3 De G., M. & G. 620.

A letter by a mortgagee to the agent of the claimant —by letter; of the equity of redemption, referring to the locality of the mortgaged property, expressing his willingness to settle the business, and recognizing the claimant as the heiress of the property, was held a sufficient acknowledgment of her title within the sect. 28 (c).

In *Stansfield v. Hobson* (d), Sir J. Romilly, M. R., said, he could not distinguish the case before him and *Trulock v. Robey*, but that it is very difficult to say whether the latter case is quite consistent with all the other cases.

A mortgagee, by letter addressed to the solicitor of the mortgagor, said, "I do not see the use of meeting unless some one is ready with the money to pay me off." This was held to amount to a qualified admission by the mortgagee that if any person was ready with the money to pay him off such person would have the right to do so and that he, the mortgagee, would be bound to receive the money. In other words that he held a redeemable estate, that is, by way of mortgage, and therefore a sufficient acknowledgment to the agent of the mortgagor (e).

A mortgagee keeping an account of rents, but not rendering it to the mortgagor or to any person claiming the lands through him, and also otherwise treating himself as a mortgagee during the possession for twenty years, would not be such an acknowledgment of the right or title of the mortgagor or of such person as is contemplated by the sect. 28 of 3 & 4 Will. 4, c. 27 (f). —by keeping accounts.

The acknowledgment in writing, contemplated by the sect. 40 of the 3 & 4 Will. 4, c. 27, has been said to be such a *voucher in writing* as can be given by one party and received by another for the purpose of evi- Bankrupt's balance sheet, master's report, insufficient under sect. 40.

(c) *Trulock v. Robey*, 12 Sim. 402. Beav. 286; *S. C.* on appeal, 3 De G. M. & G. 620.

(d) 16 Beav. 236, 238.

(e) *Stansfield v. Hobson*, 16 Sim. 426. (f) See *Baker v. Wetton*, 14

dencing, between them, the existence of the right (*g*), and therefore the balance sheet of a bankrupt (*h*), or a master's report in a suit in Chancery (*i*), is not a sufficient acknowledgment within that section.

In *Barrett v. Birmingham* (*h*), however, Sir M. O'Loughlen, M. R., said, he was not satisfied that *Hill v. Stawell* was rightly decided, and that it seems to have been decided merely on the question, whether the report was a sufficient acknowledgment in writing within the meaning of the act, without reference to the question whether the report did not confer a new right to receive the money secured by the judgment as fully as a judgment of revivor would have done; the debtor being a party to the report and consequently bound by it. In *Milington v. Thompson* (*l*), also Blackburne, C., said it is impossible, with reference to the judicial and other opinions that have been given on this provision of the statute, and to its plain and obvious policy, to hold that the document signed must be such as to be capable of manual delivery. An acknowledgment within this provision means any document signed by the debtor expressive of his intention to admit the debt and to have it produced and used for that purpose.

Insolvent's
schedule suffi-
cient under
that sect.

The schedule of an insolvent debtor, containing the names of his creditors with the amount of their debts, and filed in the Insolvent Debtors' Court, is a sufficient acknowledgment within the sect. 40 of the 3 & 4 Will. 4, c. 27 (*m*).

Need not
amount to a
new promise.

An acknowledgment under the sects. 40 and 42 of the 3 & 4 Will. 4, c. 27, means not such a one as would amount to a promise to pay and so make a new

(*g*) *Hill v. Stawell*, 2 Jebb & S. 889.

(*h*) *Pott v. Clegg*, 16 M. & W. 321; *In re Clendinning*, 9 Ir. C. R. 284.

(*i*) *Hill v. Stawell*, 2 Jebb & S. 889.

(*k*) Flan. & K. 556, 4 Ir. Eq. Rep. 537, *S. C.*

(*l*) 8 Ir. C. R. 236, 238.

(*m*) *Barrett v. Birmingham*, Flan. & K. 556; 4 Ir. E. R. 537; But see ante, p. 660.

cause of action, but any acknowledgment in the mode prescribed (*n*).

An acknowledgment may be that a sum of money was advanced, and yet not be an admission that it is still due; but if followed by other expressions, in which the party, though not prepared to admit by whose default the money has not been paid, yet admits that it is still due, that is a sufficient acknowledgment (*o*).

A judgment revived on a *sci. fa.* is neither a payment nor an acknowledgment in writing signed by the person by whom the money is payable, or his agent, within the sect. 40 of 3 & 4 Will. 4, c. 27 (*p*).

Whether the payment on a collateral security, not given contemporaneously with, but after, the primary security, will take, as to the latter security, a case out of that section, has been doubted (*q*).

An acknowledgment under the sect. 42 of that statute must be given with the view of making, or of showing, the person making it liable to the demand of the person to whom it is given (*r*); and, so far, is within the principle of the cases of *Whippy v. Hillary* (*s*) and *Routledge v. Ramsay* (*t*), although they depended upon a different statute (*u*), expressed in language differing from that of the 3 & 4 Will. 4, c. 27.

The principle of *Whippy v. Hillary* and *Routledge v. Ramsay* seems to be that the person making the acknowledgment must recognize his own liability, and not point to the liability as attaching to others, or to be discharged in another mode than by himself (*x*); and in

(*n*) See *Moodie v. Bannister*, 4 Drew. 432; *Furedon v. Clogg*, 10 M. & W. 572.

(*o*) *Blair v. Nugent*, 3 J. & L. 658, 676.

(*p*) *Furran v. Boreford*, 10 Cl. & F. 819.

(*q*) See *O'Hara v. Creagh*, Longf. & T. 65.

(*r*) *Holland v. Clark*, 1 You. &

C. C. C. 151.

(*s*) 3 B. & Ad. 399.

(*t*) 8 Ad. & E. 221.

(*u*) 9 Geo. 4, c. 14.

(*x*) *Phillips v. Phillips*, 3 Hare, 281; *Courtenay v. Williams*, Ib. 539; *In re Littles*, 10 Ir. Eq. R. 275; *Storey v. Fry*, 1 You. & C. C. C. 608.

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neither of those two cases was there any such recognition simply, and therefore no acknowledgment; and this principle was equally applicable, and was applied, in the case of *Holland v. Clark*. In *Whippy v. Hillary*, the person not only did not make such recognition but referred to other persons to pay, and in *Routledge v. Ramsay*, although admitting the claim so far as not denying it, yet pointed out to the claimant a source from which he might obtain payment (y).

Effect of written acknowledgment under 21 Jac. 1, c. 16, and 9 Geo. 4, c. 14.

An acknowledgment in writing operates, under the 21 Jac. 1, c. 16, and the 9 Geo. 4, c. 14, in cases of simple contract debts, as a fresh promise to pay and as constituting a new cause of action (z), and ought to have the effect of making the person giving it personally liable (a); and but for the sect. 5 of the c. 42, and the same remark applies to sects. 40 and 42 of the c. 27, as respects acknowledgments under them, an acknowledgment of a specialty debt since the former chapter, and of the matters embraced by these two sections of the latter chapter, must have contained, either expressly or impliedly, a promise to pay, as in a case of simple contract (b).

Under 3 & 4 Will. 4, c. 42.

But under the 3 & 4 Will. 4, c. 42, the action in which the acknowledgment is to be operative must always be founded and maintained on the original obligation and on that only (c), and the acknowledgment under this statute does not mean one which would amount to a promise to pay, and so make a new cause of action, but any acknowledgment (d). So also under the 3 & 4 Will. 4, c. 27, ss. 40, 42 (e), and consistently

—and c. 27, sects. 40, 42.

(y) See also *Carroll v. Darcy*, 10 Ir. Eq. R. 321.

(z) See *Putnam v. Bates*, 3 Russ. 188, and other similar cases.

(a) *Hyde v. Johnson*, 2 Bing. N. C. 776.

(b) *Moodie v. Bannister*, su-

pra.

(c) *Reddam v. Morley*, 1 De G. & J. 1.

(d) *Moodie v. Bannister*, 4 Drew. 432.

(e) *Carroll v. Darcy*, 10 Ir. Eq. R. 321.

with the decision that the liability of the person giving the acknowledgment must be made or shown by it (*f*).

In *Carroll v. Darcy*, Brady, C., admitted that, in cases of simple contract, a letter written, shifting the liability to another, or excusing the writer from payment, would not be a sufficient acknowledgment. But that where the acknowledgment only is required and the debt exists, the object being only to extend the time for payment, an acknowledgment without more is sufficient, and he held that letters, recognizing the existence of a judgment debt, though qualified by an offer of payment from a fund stated to be the only available one, was a sufficient acknowledgment under this statute.

Of judgment debts under sect. 40.

Where an acknowledgment was given by the agent of a trustee to sell lands and to pay debts, the court said, the personal liability of the party is out of the question. The 3 & 4 Will. 4, c. 27, applies to sums of money payable out of any land. The trustee, who is the party by whom the money is payable, may acknowledge the debt by a writing signed either by himself or his agent; but such an acknowledgment will not impose on him any personal liability to pay the debt. All that the act requires is that *some* acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. The act, therefore, allows of considerable latitude as to the form of the acknowledgment, and consequently it is not necessary that the acknowledgment should state the amount of the sum alleged to be due. If it refer to the thing in question, it is sufficient, and it was held that a mere acknowledgment of the claim was sufficient (*g*).

Given by a trustee imposes no personal liability.

The cases *Lord St. John v. Boughton* and *Carroll*

(*f*) *Holland v. Clark*, *supra*. ton, 9 Sim. 219. See also *Carroll v. Darcy*, 10 Ir. Eq. R. 324.
(*g*) *Lord St. John v. Boughton*

v. *Darcy* were upon the section 40 of the 3 & 4 Will. 4, c. 27, and the terms of that section, as observed in those cases, are "some acknowledgment" in writing. The terms of section 42 of the same statute are "an acknowledgment," and in section 5 of the 3 & 4 Will. 4, c. 42, are "any acknowledgment" (h).

Admission of
arrears to
agent.

An admission by the person liable to the agent of the person entitled to arrears of rent that rent is due is an acknowledgment of the title of the principal to such arrears (i).

Deed executed
after dated.

If an acknowledgment be made by deed, which is not executed until several years after the date of it, the deed, as an acknowledgment, if read as speaking from its date, may not be, but if read as speaking from its execution, may be, a sufficient acknowledgment (k).

The consent or agreement which may deprive a tithe payer of the benefit of the 2 & 3 Will. 4, c. 100, may be by an answer to a bill in Chancery for establishing a modus claimed under an agreement therein stated; but to take the payment of a modus for the statutable period out of the operation of the section 1 by virtue of the concluding part of it, the payment must be made by consent or agreement in writing for the payment of the very modus, during all or some part of that time, and that by a person who could otherwise have objected to the payment (l).

By payment.

A part payment of principal, to preserve the right must appear to have been made, first, on account of a debt, secondly, on account of the debt for which the action or suit is brought, and, thirdly, as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is that it admits a greater debt to be due at the time of the part

(h) *Moodie v. Bannister*, supra.

(i) *Furdon v. Clogg*, 10 M. & W. 572.

(k) *Jayne v. Hughes*, 10 Ex. 430.

(l) *Tymber v. Brown*, 3 Ex. 117.

payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt(*m*); and the creditor is allowed to show that the payment was made on account of a larger sum remaining due; for there must be something to show that the payment had reference to a larger debt. Words accompanying the act of payment would be necessarily admissible to show the connection between the payment and such larger debt(*n*).

A payment made by an agent on foot of the whole claim and allowed by his principal in account between them is a sufficient acknowledgment to take the claim out of the Statutes of Limitation(*o*). Payment by agent.

Part payment made by an agent authorized to offer a part of the claim in discharge of the whole, but who, on the claimant refusing the offer, pays in part, is not a part payment within the statute(*p*).

Payments of an annuity charged on personalty, that is, a legacy, are payments of so many parts of the principal money constituting the annuity within the section 40 of 3 & 4 Will. 4, c. 27(*q*). Payments of annuity;

In the case of payment of interest there must be reasonable evidence of the identity of the debt on which the interest was paid with that sued for(*r*), and also evidence of the payment being *quâ* interest(*s*), and at some specific time within the period of limitation(*t*). —of interest;

The interest to be paid within the meaning of the 1 Vict. c. 28, and the 3 & 4 Will. 4, c. 42, means, not merely that which is reserved by the original mortgage,

(*m*) *Tippets v. Hoane*, 1 C., M. & R. 252; *Waugh v. Cope*, 6 M. W. 825; *Wainman v. Kynman*, 1 Ex. 118; *Mills v. Fowkes*, 7 Scott, 444; *Whitley v. Lowe*, 2 De G. & J. 712; *Davies v. Edwards*, 7 Ex. 22.

(*n*) *Cottam v. Partridge*, 4 Man. & G. 271, 292.

(*o*) *Frster v. Thompson*, 2 Con. & L. 568.

(*p*) See *Linsell v. Bonsor*, 2 Bing. N. C. 241.

(*q*) *Ashwell's Will*, John. 312.

(*r*) *Waters v. Tompkins*, 2 C., M. & R. 723.

(*s*) *Sims v. Brutton*, 5 Ex. 802.

(*t*) *Gregson v. Hindley*, 10 Jur. 383; *Homan v. Andrews*, 1 Ir. Eq. R., N. S. 106.

payable *as such* at the end of six months, and which alone could be recovered as interest, *eo nomine*, in an action of debt, but, all interest recoverable in debt or in covenant as damages, (which is, in common parlance, interest,) and the payment of this description of interest gives a fresh period of twenty years under the 3 & 4 Will. 4, cc. 27 and 42, and the 1 Vict. c. 28. It is impossible to suppose that these statutes mean to give the additional period of twenty years in consequence of the payment of only the interest properly so called, and usually payable at the end of six months (*u*).

—by retainer.

A retainer of the interest by a tenant for life of the money secured by a judgment is, both at law (*x*) and in equity (*y*), a payment within the Statute of Limitations.

(*u*) See *Forsyth v. Bristowe*, 8 Ex. 716.

(*x*) *Dillon v. Kennedy*, 1 Jebb & Sy. 579; *Cummins v. Finn*, cit. 12 Ir. Eq. R. 591.

(*y*) *Burrell v. Earl of Egmont*, 8 Beav. 205; *O'Fallen v. Dillon*, 2 Sch. & L. 13; *Kirkwood v. Lloyd*, 11 Ir. Eq. R. 561; 12 Ib. 585.

CHAPTER XI.

THE INTERPRETATION OF STATUTES OF LIMITATION.

PEACE and concord are the end of all laws, and the law was ordained for the sake of peace; and, therefore, those laws which bring the greatest peace are the most estimable (*a*). As was said of the law touching fines, such are the laws the subject of this treatise, for they secure and quiet the inheritances of the people, and fix them upon a certain foundation; and, as uncertainty is the mother of contention, so certainty is the mother of repose (*b*). In the interpretation of all laws the end or design is the primary object to be ascertained. They attain this object in different modes—some directly, others indirectly and collaterally. The laws which are the subject of this Book have in view, immediately and directly, this object, and therefore, in general, their terms and application are the principal objects for consideration, so as that their immediate and direct object may be effectually accomplished. Sometimes, however, an object subordinate to the primary one may be involved in the law. It may be a remedial law, and the end or design cannot be fully ascertained from the law itself, without a preliminary investigation of the nature of the mischief intended to be remedied. The primary design, therefore, of the laws, the subject of this Book, being immediate, direct and obvious, this chapter is chiefly devoted to a consideration of, first, the

The object of
this chapter.

(*a*) Plowd. 368.

(*b*) Ib. 368 a.

general principles applicable in the interpretation of all these laws, and then to a consideration of the interpretation which has been given to each of the statutes which are the immediate subject of this Book.

SECTION I.

The Interpretation in general.

The intention,
and how as-
certained.

In applying the maxims of interpretation to any law the object is throughout, first to ascertain by legitimate means, and next to carry into effect, the intention of the legislature (*c*). Conjecture, however, as to the intention, is inadmissible. We cannot say of the legislature that it is *inops consilii*; but we may say that it is "*magnas inter opes inops*" (*d*).

That must be the truest exposition of a law which best harmonises with its design, its objects, and its general structure (*e*), and everything which is within the intent of the makers of the law, although not within the letter, is as strongly within the law as that which is within the letter and the intent also (*f*). For the letter without the sense does not make the law, but the letter and the sense together, and every one that would be acquainted with the law positive ought to understand them both. And the way to apprehend the sense is to consider the common law, which is the ancient of every positive law, and has a place in the exposition of the law positive (*g*). The true construction of a statute is to give effect to the intent and object of the legislature, as far as it is possible, and, if there be provisions seemingly

(*c*) Dwar. on Stat. 569.

(*d*) Hor. Od. III. 16, 28. Per
Lord Tenterden, C. J., 9 B. & C.
753.

(*e*) Dwar. on Stat. 556.

(*f*) Plowd. 366.

(*g*) Plowd. 363 a.

inconsistent or contradictory, to reconcile them so as to further that intent (*h*).

The key to the opening of every law is the reason and spirit of the law—it is the *animus imponentis*, the intention of the law maker, expressed in the law itself, *taken as a whole*. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute; it is to be viewed in connexion with its whole context—meaning by this, as well the title and preamble (*i*), as the purview or enacting part of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute (*j*); rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed, by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature in making and passing the statute itself (*k*). Pollock, C. B., referring to this case, said the title is certainly no part of the law, and in strictness ought not to be taken into consideration at all, and referred to the opinions of Lord Coke (*l*), Lord Holt (*m*), Lord Mansfield (*n*), and Lord Hardwicke (*o*).

The reason and spirit of a law.

Preamble.

But the object and view of the legislature is not the only thing, said Lord Brougham (*p*), which is to be taken into account by courts of justice in construing what the legislature has actually done, could we know exactly what it meant, or gather from the preamble the very object it had in view; if on considering the terms used, we found that instead of merely accomplishing

Effect of, in ascertaining the object of a law.

(*h*) Per Williams, J., 2 Bing., N. C. 11.

(*i*) See 1 Jo. & Lat. 61.

(*j*) Plowd. 369.

(*k*) Per Sir J. Nicholl, 3 Ad. 216.

(*l*) *Pomlier's case*, 11 Co. 29.

L.

(*m*) *Wells v. Wilkins*, 6 Mod. 62.

(*n*) *Rex v. Williams*, 1 W. Bl. 95.

(*o*) *The Att.-Gen. v. Lord Weymouth*, Amb. 22; 2 Exch. 283.

(*p*) 2 Moore, P. C. C. 239.

that particular object, a much larger one was accomplished, it would not do to limit the construction of the expressions and the operation of the enactment by the words of the preamble. The preamble may be perfectly clear, may leave no doubt whatever of the intention; but if it is equally clear that more has been done than was meant to be done, shall we say that because it is not included in the preamble, that was not done which has been accomplished? According to all rules of construction, if any ambiguity hangs over the enacting part, resort is had to the preamble, and finding from the preamble what the intention of that measure was, you then construe the enacting part, which, but for that, would be ambiguous, giving to it that meaning which the preamble sanctions. But when there is no doubt whatever in the enactments, the preamble is not to be left to control the words and to confine their operation, if they plainly and without any implication, by direct meaning and intendment, give to the section a larger scope. Lord Wensleydale also said (q), "There can be no doubt that we must consider the preamble as a key to the construction of the statute, though it would not, of course, control every provision, for we very often find that the subsequent provisions of a statute extend beyond the limits of the preamble."

Danger of interpretation founded on the remedy being more extensive than the evil.

There is no line of reasoning, said Lord Denman (r), so dangerous as that which would deprive the statute law of its fair meaning, or, in other words, repeal an act of parliament by a judicial construction founded on the mere fact that the remedy provided is more extensive than the evil to be cured. It is enough to say, in general terms, on this doctrine, that the evil is but the motive for legislation, and the remedy may both consistently and wisely be extended beyond the mere cure of that evil to every provision which the most comprehen-

(q) 7 Moore, Ind. A. R. 99.

(r) 4 Q. B. 349.

sive view of the law, the state of manners, and of society at large, may appear to render expedient (*s*).

In expounding acts of parliament, where words are express, plain and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the act by reason of some subsequent clause, from whence it might be inferred the intent of the parliament was otherwise (and this holds with respect to penal as well as other acts (*t*)). And "the generality of the words," said Burton, J. (*u*), "may properly be restrained within the limits of the declared or implied policy of the statute; the more especially if a construction, to the full extent of its phrase, would lead to any repugnancy or inconsistency in its provisions. That policy is, however, I conceive, only to be looked for in the statute itself, and not to be either enlarged or contracted upon merely speculative grounds—a mode of construction that always incurs the hazard, and has, perhaps, in some instances, produced the effect, of legislating in the form of exposition." The modern rule is, that statutes must be construed according to their plain meaning, neither adding to nor subtracting from them (*x*).

It is also a rule in the construction of statutes, that, in the first instance, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (*y*). The grammatical construction.

(*s*) Per Lord Denman, 4 Q. B. 349.

6 H. of L. Cas. 106.

(*t*) *Moore v. Hussey*, Hob. 93, 97. Per Parker, C. B., Parker's Rep. 238.

(*x*) Per Bramwell, B., 4 Exch., N. S. 629.

(*u*) 1 Huds. & B. 636. See also,

(*y*) 1 Huds. & B. 648; 6 H. of L. Cas. 106.

struction, said Pollock, C. B.(u), has frequently been adverted to in this court. He said, however, "I doubt, if it were laid down as a general rule, that the grammatical construction of a clause shall prevail over its legal meaning, whether a more certain rule would be arrived at, than if it were laid down that its legal meaning shall prevail over its grammatical construction. In my opinion, grammatical and philological disputes, and indeed all that belongs to the history of language, is as obscure and leads to as many doubts and contentions as any question of law, and I do not, therefore, feel sure that the rule, much as it has been commended, is on all occasions a sure and certain guide. It must, however, be conceded, that where the grammatical construction is quite clear and manifest, and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document (and the same rule applies in the construction not only of an act of parliament, but of deeds, wills and of any subject of a like nature), that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning shall prevail in spite of the grammatical construction of a particular part of it."

Remedial laws,
and how in-
terpreted.

All the laws, the subject of this Book, are more or less of a remedial nature, some amending and extending the existing laws on the same subject; others applying them to matters which have not been previously embraced by them; and therefore, so far as they are of that nature, are to receive a benign and liberal construction (v), and to be interpreted so as to suppress the

(u) 8 Exch. 356.

(v) 11 Co. 67; 1 Jo. & Lat. 60.

mischief and advance the remedy (*x*). So far, indeed, has this rule been extended, that as Alexander, C. B., said, it is by no means unusual, in construing a statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief where the statute is remedial (*y*). And the reason of the rule, that the enactment is to be construed liberally, warrants the proposition, that exceptions in such statutes should be construed strictly; and that the benefit of the enactment is not to be withheld from any case within the mischief, except by the use of plain and explicit terms, evidencing that such is the intention of the legislature (*z*).

In the construction of all remedial statutes, the points to be considered are—how the common law stood at the making of the act—what the mischief was, for which the common law did not provide—what remedy the parliament hath provided to cure the mischief (*a*)—and the position, at the time of passing the act, of the subject-matter upon which it intended to operate (*b*).

Points to be considered in their interpretation.

Whether a statute is, or is not, remedial may sometimes be a question. "If," said Coleridge, J. (*c*), speaking of the 2 & 3 Will. 4, c. 100, "the statute worked no change in the law of tithes, affected the proof only in suits for tithes, if the rights of parties be left as before, and only an inconvenience, amounting to injustice, in the mode of establishing those rights, be removed, then the act certainly is remedial, and should receive a very liberal interpretation. But, if the statute has altered the law, and very seriously affected the rights of the tithe owner, and created both a new head of *modus*, and a new head of exemption, by mere proof

Whether a statute is, or is not remedial, sometimes a question.

(*x*) 3 Rep. 7; 6 Rep. 20; Co. Litt. 381 b; 4 Q. B. 316, 328; 2 Exch. 273; 1 Hnd. & B. 623, 654.

(*y*) *The Dean and Chap. of York v. Middleburgh*, 2 You. & Jer. 199.

(*z*) Per Blackburne, M. R., 1 Jones & Lat. 60.

(*a*) 3 Rep. 7; 6 Rep. 20; Co. Litt. 381 b.

(*b*) 1 Mac. & G. 259.

(*c*) 4 Q. B. 318.

of a qualified mode of payment, or entire enjoyment, as the case may be, for a certain number of years and incumbencies, the act cannot judicially be considered remedial: it alters the nature and value of property known to the law; it affects the oldest title in the kingdom; and this, without any declaration that the quality to be altered is unjust or inconvenient, even when the occasion seemed most imperative for so declaring it; and it creates in all the lay tithe payers in the kingdom a right or capacity which they had not before, without asserting in the preamble its justice or expedience." But Williams, J., on the same occasion, said, "this statute is, I presume, unquestionably remedial. Such, however, I feel myself bound to consider it" (e).

Exposition of one part of a statute by another part,

When one branch in an act is obscure, it is usual for those who expound the act to examine the other branches; for we may often find out the sense of a clause by the words or intent of another clause (f). The most natural and genuine exposition of a statute is to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers (g); and in construing doubtful clauses, it is very useful to trace the method which the drawer of the act has observed in the distribution and arrangement of his subject (h).

—and of laws in *pari materia*.

As one part of a statute is properly called in to help the construction of another part, and is fitly so expounded as to support and give effect, if possible, to the whole, so is the comparison of one law with other laws made by the same legislature, or upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with a like advantage; and as in applying the maxims of interpretation, the object is throughout, first to ascertain by legitimate means,

(e) 4 Q. B. 328.
(f) Plowd. 365.

(g) Co. Litt. 381 a.
(h) 3 Taunt. 220.

and next to carry into effect the intentions of the legislature, an inference arises, that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions (*i*). Hence, the well-established rule of law, that all statutes *in pari materiâ*, whether in their entirety (*k*) or in part, whether only in clauses (*l*) or only in particular terms (*m*), for that seems reasonable (*n*), and notwithstanding some of the statutes have expired (*o*) or are not referred to (*p*), or that one clause has some words which are wanting in another (*q*), are considered as framed upon one system and having one object in view, and are to be taken together as if one law, compared in their construction (*r*), and construed consistently (*s*). Sometimes a clause is inserted that the act and other acts are to be read as one (*t*). If, however, the acts be *in pari materiâ*, the construction would be the same without that clause (*u*).

The Statutes of Limitation as to claims between the Crown and the subject (*x*), being *in pari materiâ*, may be considered in effect as one code of laws, applicable to England and Ireland. It would be unjust that there should be one law in Ireland and another in England; the former not giving to the subject in Ireland the same benefit which the English statutes secure to the subject in England (*y*).

As to the Statutes of Limitation between the Crown and subject.

(*i*) Dwar. on Stat. 569.

(*k*) Plowd. 206; Bro. Waste, pl. 68; Barn. Chan. Rep. 276; 4 T. R. 447; 5 T. R. 417; Doug. 40; 1 Jones & La. 36; 8 Exch. 411; *Re Earl of Mayo*, Lloyd & G. 118.

(*l*) 2 T. R. 609; 3 Ad. & E. 895; 1 Phill. 338, 627; 6 Scott, 461.

(*m*) 5 B. & C. 162; 6 Scott, 461; 4 T. R. 419; 7 Q. B. 811.

(*n*) Per Erle, C. J., 2 C. B. 777.

(*o*) See 4 B. & Ald. 98; 8 Ad.

& E. 405; 1 Burr. 447.

(*p*) 1 Vent. 246.

(*q*) Barn. Chan. Rep. 276; 3 Ad. & E. 895.

(*r*) 7 Q. B. 811.

(*s*) 1 Burr. 447.

(*t*) Spe 19 & 20 Vict. c. 108, s. 3; 24 & 25 Vict. c. 62, s. 2.

(*u*) Per Lord Campbell, C. J., 27 L. J., Q. B. 55.

(*x*) 21 Jac. 1, cc. 2, 14; 15 Car. 1, c. 1 (I.); 9 Geo. 3, c. 16; 48 Geo. 3, c. 47 (I.).

(*y*) Per Sugden, L. C., 1 Jones & La. 36.

The old Statutes of Limitation.

The statute 21 Jac. 1, c. 16, seems to be strictly *in pari materiâ* with the 32 Hen. 8, c. 2, . . . and also with other statutes which may be called Statutes of Limitation, such as the Statute of Fines (*z*). . . . The object of the provisions in all these statutes is the same, to give effect to the maxim, *interest reipublicæ ut sit finis litium* (*a*).

The modern Statutes of Limitation are *in pari materiâ*.

The modern Statutes of Limitation (*b*) are *in pari materiâ*, and ought to be read as consistent with each other, and with the view of providing for the different cases they respectively intended to remedy (*c*) relating to real property. The words in each statute are to the same effect, and the construction has been to make the statutable time a title to the right (*d*). So in construing the modern Statute of Limitation as to real property (*e*), the interpretation of the old Statutes of Limitation (*f*) has been called in to aid, and was adopted in, the interpretation of the modern statute (*g*). So the 3 & 4 Will. 4, c. 42, the Statute of Limitation as to claims by specialty, and also as to certain claims by simple contract not embraced by the 21 Jac. 1, c. 16, is *in pari materiâ* with the latter act, and the act 4 Ann. c. 16, s. 19, and receive the same construction (*h*). It may be said, indeed, of all these statutes *in pari materiâ* here referred to, as was said of the 2 & 3 Will. 4, c. 100, and 3 & 4 Will. 4, c. 27 (*i*), that standing as they do together, yet each having its own operation, they form a very useful and convenient body of law.

(*z*) See *Doc v. Jones*, 4 T. R. 800.

(*a*) Per Cur., 8 Moore's P. C. C. 20.

(*b*) 2 & 3 Will. 4, c. 71; 2 & 3 Will. 4, c. 100; 3 & 4 Will. 4, c. 27.

(*c*) 2 De Gex, M. & G. 473.

(*d*) 2 C. B. 777; 2 Exch. 273, 286; *Earl of Stamford v. Dun-*

bar, 13 Mee. & W. 822.

(*e*) 3 & 4 Will. 4, c. 27.

(*f*) 32 Hen. 8, c. 2; 21 Jac. 1, c. 16.

(*g*) *Davies v. Lowndes*, 1 Phill. 328.

(*h*) See *Sturgis v. Darell*, 6 Exch., N. S. 120; *Roddam v. Morley*, 1 De Gex & J. 1.

(*i*) 2 De Gex, M. & G. 473.

The Statutes of Limitation, on which the security of all men depends, are to be favoured (*k*), ought to be and ever since they were passed have been construed liberally (*l*), and are entitled to the same respect as other statutes, and ought not to be explained away (*m*). "I cannot agree with the position," said Dallas, C. J. (*n*), "that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to be beneficially expounded, as they were passed for the purpose of supplanting the mischief or evil which before existed, and applying a remedy thereto; and this appears to me to be expressly pointed out or recorded by the very first words of the statute (*o*), which are 'for the quieting of men's estates, and avoiding of suits.' In construing this statute as well as others of a like description, they must be considered, as they were emphatically termed by Lord Kenyon, as statutes of repose, and this has been since adopted as the governing principle by which the courts were to be guided as to such construction." The legislature appears to have considered the Statutes of Limitations to be enactments in furtherance of justice. They have intended to take away absolutely every impediment to the operation of these enactments in every case (*p*). The general scope of these statutes has been the subject of too many judicial decisions to be open to much doubt (*q*). "And yet there is," said Gaselee, J. (*r*), "no branch of the law on which there have been so many decisions as on the Statute of Limitations." This was in 1835, and since then, as these pages show, the number of those decisions has been very largely increased.

If, however, these laws be applied to cases which do

(*k*) Salk. 422.

(*l*) 1 W. Bl. 286; 13 C. B. 819; 6 Moore, 567; 1 Jones & La. 60.

(*m*) 3 Curt. Amer. Rep. 81.

(*n*) 6 Moore, 558.

(*o*) 21 Jac. 1, c. 16.

(*p*) Per Erle, J., 8 Ell. & B. 438.

(*q*) 13 C. B. 819.

(*r*) 2 Bing., N. C. 245.

not properly come within them, we take away, without warrant, the rights of the parties (*b*); and as these laws constitute a defence, the creature of positive law, therefore they are not to be extended to cases which are not strictly within them (*c*).

Mr. Justice Story has observed, that it has often been matter of regret in modern times that, in the construction of the Statute of Limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavourable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose (*d*). "Of late years, however," said Lord Brougham (*e*), "I rejoice to say, the sounder principle pervades all our courts, both of equity and of law—that of giving the most liberal and extensive construction to whatever statute affixes a limitation of time."

Their object
and intention.

The object and intention of the Statutes of Limitation generally being the same, these statutes, notwithstanding any slight variation of phrase, ought to receive and do receive a uniform construction (*f*). The Statute of Fines (*g*) was made for the public good, and to settle and quiet the inheritances of the subjects of the realm, and therefore the sense of it ought to be largely extended to the benefit of those who are in possession of land, and to the destruction of the right of those who have right, and are remiss in making their claim. For the intent of the act was to favour those who had estates by fine, and to hurt those who had right, and neglected to pursue it within five years (*h*). The old Statutes of Limitation (*i*) were founded on the like

(*b*) 1 You. 18.

(*c*) Plowd. 375; 1 De Gex & J.
23.

(*d*) See Broom's Leg. Max. 694.

(*e*) Deb. on Diss. Chap. Bill.

(*f*) 4 T. R. 308; 5 B. & Ald.

215; 7 Q. B. 811; 1 Phill. 338.

(*g*) 4 Hen. 7. c. 24.

(*h*) Plowd. 538.

(*i*) 32 Hen. 8, c. 2; 21 Jac. 1,
c. 16.

reason, and therefore received the same interpretation (*k*); and the object of both being to limit all men to a certain time, for the tranquillity and repose of the public, no time was to be gained by exposition or equity beyond the express words of the statutes (*l*). So in the case of the modern Statute of Limitations in relation to real property (*m*), the doctrine of equitable extension cannot be applied to this act, for there is nothing on which to found it (*n*).

When and to what extent statutes are or are not retroactive is frequently a question as important as difficult to determine. On several occasions, this question, in relation to the Statutes of Limitation, has arisen.

When statutes are retroactive.

In general, on the first principles of jurisprudence, no statute has a retroactive operation, or is to be supposed to apply to a past, but only to a future state of circumstances (*o*). Regularly *nova constitutio futuris formam debet imponere, non præteritis* (*p*), especially where a retroactive operation would defeat a vested right (*q*), or materially alter the relative situations of persons (*r*); for a retroactive statute would involve all the mischiefs of an *ex post facto* law, and in relation to property or to contracts would violate every sound principle of justice; and to punish those who have offended against no law, and to take away existing rights without compensation, is in the nature of punishment—would violate the first principles of justice (*s*). The broad principle,

General principle.

(*k*) Plowd. 371; *Benyon v. Evelyn*, Bridg. 359.

(*l*) Plowd. 371.

(*m*) 3 & 4 Will. 4, c. 27.

(*n*) *Davies v. Lowndes*, 1 Phill. 328.

(*o*) 2 Exch. 40.

(*p*) 2 Inst. 292; 7 Bac. Ab. 439, Stat. C.

(*q*) *Gilmore v. Shuter*, stated 6 Bing. 259; *Couch v. Jeffries*, 4 Burr. 2460; *Edmonds v. Lanley*,

6 Mee. & W. 285; *Nalstrop v. Scarisbrick*, 6 Mee. & W. 684; *Moore v. Phillips*, 7 Mee. & W. 536; *Moon v. Durden*, 2 Exch. 22; *Marsh v. Higgins*, 9 C. B. 551; *Waugh v. Middleton*, 8 Exch. 852; *Evans v. Williams*, 11 Jur., N. S. 256; *Jackson v. Woolley*, 8 E. & B. 787, on error.

(*r*) *Kay v. Goodwin*, 6 Bing. 576.

(*s*) 2 Exch. 41.

said Kindersley, V.-C. (*t*), is, that unless the court sees a clear indication in the act to legislate *ex post facto*, so as to deprive a man of a right which existed at the time of the passing of the act, the court will always assume that the legislature never does intend to deprive that man, by *ex post facto* law, of a right which existed at the time when that act passed, unless, indeed, it be in cases where an act is passed which deprives a man of his land because it is wanted for certain purposes; and in those cases compensation is provided. But putting aside cases of that sort, unless it is clear that the legislature meant to make the act retrospective, so as to take away a man's right, the court would never put that interpretation on the act.

Qualification
of it.

This principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes (*u*). If, however, an enactment indicate beyond doubt that the legislature intended the enactment to operate retrospectively (*x*), this principle or rule, which is one of construction only (*y*), will certainly yield to that intention, although the effect be to defeat a vested right (*z*); and all that the decisions establish is, that we are to find out the intention of the legislature in each particular act (*a*).

Illustrations.

The application of this rule or principle, and of the qualification of it, may be illustrated by a few examples. It may first be remarked that in general the law, as it existed when the action is commenced, must decide the rights of the parties in the suit, unless the legislature express a clear intention to vary the relation of the litigant parties to each other (*b*).

Enactments
not retroactive.

In February, 1676, a parol agreement founded on a consideration of marriage was made, and before June,

(*t*) *Evans v. Williams*, 11 Jur., N. S. 256.

(*u*) 2 Exch. 33.

(*x*) 2 Exch. 33; 3 Exch. 687.

(*y*) 2 Exch. 43; 9 C. B. 569.

(*z*) *Towler v. Chatterton*, 6 Bing. 258.

(*a*) Per Lord Campbell, C. J., 8 Ell. & B. 437.

(*b*) 6 Ad. & E. 951.

1677, an action thereon was commenced. In April, 1677, a statute (c) was passed and enacted (d), that after the 24th of June, 1677, no action should be brought on any agreement made in consideration of marriage, unless the agreement be in writing, &c., signed, &c. The statute was pleaded in bar of, but was held not to affect the action (e). This case has been cited in support of the proposition that a new law, introducing new requisites, will not avoid a contract which was valid before the law passed (f). But in *Towler v. Chatterton* (g), a parol promise was made in February, 1828. In the May following a statute (h) was passed, but the operation of it was postponed until the 1st of January, 1829, and enacted (i), that in actions of debt, &c., no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, &c., to take any case out of the 21 Jac. 1, c. 16, or to deprive any party of the benefit thereof, unless in writing and signed, &c. In Hilary Term, 1829, an action was commenced on the parol promise made in February preceding, and a plea of the statute was held a bar to the action (k).

The same statute (l), enacts (sect. 6), that no action shall be brought on any representation as to character, unless in writing and signed, &c. Between the passing and the coming into operation of this act, a parol representation of character was made. Before the time when the statute came into operation, the 1st of January, 1829, an action was commenced upon such parol representation, but the action was tried after that day, and Lord Tenterden himself, at *Nisi Prius*, held that the enactment was not retroactive, and that

(c) 29 Car. 2, c. 3.

(d) Sect. 4.

(e) *Gilmore v. Shuter*, stated 6 Bing. 259. On this case, see the remarks of Rolfe, B., 2 Exch. 88.

(f) Dwar. on Stat. 542.

(g) 6 Bing. 258.

(h) 9 Geo. 4, c. 14.

(i) Sect. 1.

(k) See also *Fellowes v. Williamson*, 1 Moo. & M. 306.

(l) 9 Geo. 4, c. 14.

the promise by parol was sufficient to sustain the action (*t*). In *Ansell v. Ansell* (*u*), his lordship said there was a very material difference in the wording of the 1st and the 6th sections, and that the words of the latter required a very different construction to those of the former.

8 & 9 Vict.
c. 109, s. 18.

So where in 1844 a wager on a horse race was made, and in 1845 an action for the recovery of the wager was commenced. After such action was commenced a statute (*x*) was passed, and enacted (*y*), that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall be deposited in the hands of any person to abide the event on which any wager shall have been made. The act was pleaded in bar to such action, but was held not to have a retrospective operation, so as to affect such contract and consequently such action. The decision was mainly rested on the first branch of the section, and the second branch of it was considered by the majority of the court as redundant. Alderson, B., doubted whether by the first branch the legislature might not have intended to put at once an end to the legal obligation both of existing and future contracts, leaving the parties to all such wagers to act thereafter on them as honourable engagements alone; and Parke, B., suggested strong reasons for limiting the operation of the words of the section, and holding that they apply to future contracts, and actions on such future contracts only—at all events to future actions only, if any distinction can be made in the degrees of apparent injustice. But suggested on the other hand, that the parties who

(*t*) *Fellows v. Williamson*, 1
Moo. & M. 306.
(*u*) 1 Moo. & M. 299.

(*x*) 8 & 9 Vict. c. 109.
(*y*) Sect. 18.

would suffer by a strict construction of the clause are often successful gamesters or speculators, not much the objects of favour with the legislature, and considered the clause therefore not quite in the same spirit as if the enactment related to ordinary contracts. He considered, however, that mere redundancy was not sufficient to show that the legislature meant to do so unjust a thing as to prevent the maintenance of an existing well-founded action (z).

The Court of Chancery, before the long vacation of 1852, made an order for a case to be stated, in a matter of revenue, for the opinion of the Court of Exchequer. In July in the same year, the Chancery Procedure Amendment Act (a) was passed, and enacted (b) that "it shall not be lawful for the Court of Chancery in any cause or matter to direct a case to be stated for the opinion of any court of common law, &c.;" and the operation of the statute was postponed until the 1st of November in the same year. In Michaelmas term in that year application on the part of the crown, to hear the case so stated, was made to the Court of Exchequer, and that court held that this statute had not taken away the jurisdiction to hear the case, or in other words that the statute had not a retroactive operation (c).

15 & 16 Vict.
c. 86, s. 61.

The cases next to be noticed are some of those in which enactments have been held to have a retroactive operation.

Enactments
retroactive.

In three cases at nisi prius (d), parol promises were given, and the actions thereon were commenced, before the statute (e) pleaded in bar to such actions came into operation, the 1st of January, 1829, but such actions

9 Geo. 4, c. 14,
s. 1.

(z) *Moon v. Durdan*, 2 Exch. 22. Approved, 6 Moore, P. C. C. 256.

(a) 15 & 16 Vict. c. 86.

(b) Sect. 61.

(c) *Hobson v. Neale*, 8 Exch.

131.

(d) *Kirkhaugh v. Herbert*, cited, 6 Bing. 265; *Hilliard v. Lenard*, 1 Moo. & M. 297; *Ansell v. Ansell*, 1 Moo. & M. 299.

(e) 9 Geo. 4, c. 14.

were not tried until after that day, and in each of these three cases the plaintiff was nonsuited.

The substance of the enactment pleaded in bar to such actions was, that in actions of debt, &c. no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, &c., to take any case out of the 21 Jac. 1, c. 16, or to deprive any party of the benefit thereof, unless in writing signed, &c. (*f*). Rolfe, B., referring to these three cases, said (*g*) they were decided on the ground, apparently, that the judge at nisi prius was to treat the statute as being in force at the time of the trial, and as conclusively binding him with respect to what evidence he was to receive. "If," said he, "this narrow construction is to be put on the statute, it is obvious that the 10th section must, in many cases, be a mere illusory protection, and would very often afford no protection at all. It might, perhaps, be fairly assumed that every creditor could commence his action before the 1st of January, 1829; it would be contrary to truth to assume it as certain, or, in many cases, even as probable, that he could, before that day, bring his cause to trial. Lapse of years has made it impossible that this question should ever again arise on Lord Tenterden's Act; and it may, perhaps, therefore seem to be an idle thing to discuss the doctrine involved in the cases to which we have referred. But the principle is one of general application, and may apply to future statutes and I therefore feel bound to say that I cannot think those nisi prius cases rightly decided." The retroactive operation of this statute was recognized, however, in a case before the privy council (*h*).

So in the case of *Towler v. Chatterton* (*i*), depending upon the same statute (*k*), a parol promise was made in

(*f*) Sect. 1.
 (*g*) 2 Exch. 35.
 (*h*) 7 Moore, P. C. C. 113.

(*i*) 6 Bing. 258.
 (*k*) 9 Geo. 4, c. 14, s. 1.

February, 1828. The statute was passed in May following, but the operation of it was postponed until the 1st of January, 1829 (*l*). The action was commenced in Hilary term in the latter year, and was held not to be maintainable. The court thought the case of *Gilmore v. Shuter*, there cited and stated, distinguishable and inapplicable to the case before the court, on the ground that the operation of the statute on which the case turned was postponed for several months after it had passed. But although the objects and the language of the statute, and of the statute in *Gilmore v. Shuter* differed (*m*), the operation of each was in effect alike postponed.

The words "shall be deemed" in the 9 Geo. 4, c. 14, s. 1, said Cresswell, J. (*n*), necessarily refer to the time when the judge is to determine whether the evidence tendered is sufficient or not, and that, therefore, the court in *Towler v. Chatterton* could not escape from the inevitable conclusion that the section was intended to have a retrospective operation. So in *Moon v. Durden* (*o*), Rolfe, B., said it was worthy of remark that the act points to a writing *to be signed by the parties*—that is, to future acts only; and, consequently, the decision, giving to that section a retrospective operation, was not a just one, even in conformity with the most narrow construction of its language. He also said that the judgment of the Court of Common Pleas in that case seemed to be founded mainly on the 10th section of the act, which enacted that the act should commence and take effect from the first of January, 1829; and then proceeded thus:—"From this they inferred that, when that day arrived, the act was in full operation as to all contracts, past as well as future. Parties, they observed, in possession of parol promises had seven months and upwards, namely, from May, 1828, to

(*l*) Sect. 10.

(*m*) Vide ante, p. 684.

(*n*) 9 C. B. 509.

(*o*) 2 Exch. 22.

January, 1829, during which to bring their actions; and the inference they seemed to draw was, that there would, therefore, be no injustice in giving to the statute, at the end of that time, a full operation, retrospective as well as prospective; and this they considered made the case of *Gilmore v. Shuter* inapplicable as an authority, inasmuch as in that case there was no clause similar to the 10th section in Lord Tenterden's Act. Now, if the meaning of this 10th section be, as the judges of the Court of Common Pleas, in the earlier part of their judgment, would seem to have supposed, namely, that it was meant to exclude from the operation of the statute all actions brought before the 1st of January, 1829, then the statute would work no real injustice to any one; a salutary change was to be made in the law, and reasonable time, or what was supposed a reasonable time, was given to all parties affected by the change to protect themselves from any ill consequences in respect of vested rights." "Whether the decision in *Towler v. Chatterton* was correct would depend on whether the true meaning of the 10th section was to fix a date before which all actions must be brought, or a date beyond which no parol promise should be sufficient to take a case out of the operation of the Statute of Limitations. The Court of Common Pleas adopted the former construction. Neither construction would do injustice by infringing the rule which in general makes all statutes prospective in their operation, and the Court of Common Pleas may have been right in their view of the statute." Again, Tindal, C. J., referring to the same case said (*p*), the question there was, whether, when the cause came on to be tried, the judge was to be governed, in receiving evidence, by that which was then the law of the land; and Lord Abinger, on the same occasion, said the enactment relied upon there had

particular words which made it applicable after a certain time to suits already depending.

The statute was not intended to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses (*q*).

Again, a firm of two partners gave for partnership purposes in 1848 a promissory note. In 1849 one of the partners died and left the survivor his executor, who proved the will, continued the business, and paid interest on the note until 1854 and then became bankrupt. In 1856 was commenced a suit, in which the amount of such note was claimed against the estate of the deceased partner in the hands of his surviving partner and executor. After the commencement of such suit the Mercantile Law Amendment Act (*r*), was passed, and enacted (*s*) that in reference to the 21 Jac. 1, c. 16, s. 3, the 3 & 4 Will. 4, c. 42, s. 3, and the 16 & 17 Vict. c. 113, s. 20, "where there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money by any other or others of such co-contractors or co-debtors, executors or administrators." After the passing of this statute the question of liability on such note was heard, and the court held that the payment of interest by the surviving partner was made by him in that capacity, and not in his capacity of executor of his deceased partner, and that

(*q*) 7 Bing. 166.

(*s*) Sect. 14.

(*r*) 19 & 20 Vict. c. 97.

as such surviving partner he was entitled to the benefit of such enactment; in other words, that the enactment was retroactive (*t*).

In *Jackson v. Woolley* (*u*), Williams, J., referring to the decision of Kindersley, V.-C., in *Thompson v. Waithman* (*x*), said he could not coincide with him in his interpretation of 19 & 20 Vict. c. 97, s. 14, as being retrospective. In coming to such a conclusion he does not seem to have regarded Lord Coke's well-known canon—" *Nova constitutio futuris formam imponere debet, non præteritis*." That is the ordinary rule as to the interpretation of all legislative enactments, and is to be observed unless there is something in the terms of a particular enactment to prevent its operation. "I see nothing in the language of the section under discussion to prevent its application. It would require words of no ordinary strength in the statute to induce us to say that it takes away a vested right. I see nothing in the section to give it that effect. I am of opinion that sect. 14 is wholly prospective." The rest of the court concurred.

—sect. 10.

Again, a cause of action accrued in 1844 to a person who was then in prison, and there remained for more than twelve years afterwards. In 1856 the last-mentioned act was passed, and also enacted (*y*) that no person entitled to any action, &c., with respect to which the period of limitation within which the same shall be brought is fixed by the statutes referred to, "shall be entitled to any time within which to commence and sue such action, &c., in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability by reason of such person being imprisoned at the time of such cause of action, &c. accrued." The action was commenced after this statute was passed, and

(*t*) *Thompson v. Waithman*, 3 Drew. 628.

(*u*) 8 Ell. & B., on error, 787.

(*x*) 3 Drew. 628.

(*y*) Sect. 10.

the defendant was held entitled to the benefit of it; in other words, that this enactment also was retroactive (z).

The distinctions established by the decisions generally were stated by Wilde, B. (a), to be, that when a new enactment deals with rights of action, unless it is so expressed in the act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the act. And Lord Wensleydale (b) said it is clear that there is a material difference when an act of parliament is dealing with a right of action already vested, not intended to be taken away, and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter; and that this had been most clearly and satisfactorily explained in the case of *Wright v. Hale*, especially in the judgment of Wilde, B., in that case.

Distinctions
established by
the decisions.

To prevent in, at least, some measure an *ex post facto* operation of statutes, they are frequently made to come into operation at a period subsequent to that of their passing (c). In *Amner v. Cattel* (d), Best, C. J., said it was with a view to present an *ex post facto* operation with respect to suits already commenced that the period of the act's coming into operation was postponed, and Park, J., in the same case, said that the legislature, postponing the operation of the act, indicated an intention to enable parties relying on parol promises to sue on them effectually. In *Towler v. Chatterton* (e), the court observed that in order to obviate what might by many be deemed a hardship, the operation of the act

How an *ex post facto* operation prevented.

(z) *Cornill v. Hudson*, 8 Ell. & B. 429; *Pardo v. Bingham*, 17 W. R. 419, 20 L. T. R., N. S. 464, S. C.

(a) *Wright v. Hale*, 6 Exch., N. S. 227.

(b) 10 H. of L. Cas. 763.

(c) See 9 Geo. 4, c. 14; 2 & 3 Will. 4, cc. 71, 100; 3 & 4 Will. 4, c. 27.

(d) 5 Bing. 208.

(e) 6 Bing. 258. See 2 Exch. 35.

was postponed, so as to give all persons in possession of parol promises seven months and more in which to bring their actions, founded on such promises, if so minded.

Again, in *Paddon v. Bartlett* (*f*), Tindal, C. J., said, with reference to postponing the operation of a statute until a day subsequent to that of the passing, the natural import of that is, that they shall have no operation till the day named, and therefore shall not take effect by being pleaded in an action commenced before that day ; such at least would be the construction unless there were other words to the contrary : and in *Goodall v. Skerratt* (*g*), Kindersley, V.-C., after observing that the sections 21 and 22 of the 3 & 4 Will. 4, c. 27, were clearly retrospective, said " this might seem to impose hardship upon persons who would be affected by an *ex post facto* law ; but it must be recollected that, whilst the act of parliament abolishes all real actions, it reserves a short period within which such actions may be brought." If, when the operation of a statute is so postponed, persons neglect to avail themselves of the law in force between the time of the passing of the statute and the time when it comes into operation, they cannot complain. *Vigilantibus non dormientibus jura subveniunt.*

Enactments
sometimes ex-
pressly retro-
active.

In some cases, said Rolfe, B. (*h*), the legislature has thought it just to make enactments retrospective, even at some sacrifice of general principle. But then it does so in express terms ; and generally, I believe invariably, couples the retrospective enactment with the best indemnity in favour of vested rights which the nature of the case admits : and as an illustration of his meaning he referred to the section 16 of the 8 & 9 Vict. c. 109, on which the case of *Moon v. Durden* turned, and to the 54 Geo. 3, c. 54, ss. 6 and 7, and the 2 Vict. c. 12, s. 5.

(*f*) 3 Ad. & El. 695.
(*g*) 3 Drew. 220.

(*h*) 2 Exch. 39.

Statutes of Limitation, however, as regards their retroactive operation, are to be viewed in a light different from that in which other statutes as to such operation are viewed. The primary object (i) of Statutes of Limitation can only be secured by defeating and extinguishing those rights which the owners, by their indifference and negligence, have permitted for a long period to remain dormant. These statutes, as regards the rights to which they are directed, are generally so framed as to have a retroactive operation upon them and the circumstances under which they were originally created and from time to time surrounded, until the law to be applied to them comes into operation. But as regards any proceedings which may have been adopted for the asserting and establishing of such rights before such law was made, or, if the operation of it be postponed, after the making and before the coming into operation of such law, the operation of the law, in order to obviate, as far as may be reasonable and practicable, any supposed hardship to the persons having those rights, is generally postponed, according to the nature of the case, to some period subsequent to the time when the law was made (k). In some cases the law is made to take effect from a period antecedent to the time when it was made (l). But although so made, all the provisions of it may not operate from such antecedent period. For if any of its provisions be in terms, or the intention of the legislature appears to be that those provisions shall be prospective only, the operation of those provisions will be from, not that period, but the time when it was made (m).

Statutes of Limitation, as to their retroactive operation, viewed differently to other statutes.

And in *Hunter v. Nockolds* (n), the court thought the statute reconcilable with the chapter 27, by con-

(i) Vide ante, Book I. Chap. I. Sect. III.

(k) See 3 & 4 Will. 4, c. 27.

(l) See 3 & 4 Will. 4, c. 42; post, p. 696; *Paddon v. Bartlett*,

3 Ad. & E. 884.

(m) *Burn v. Carvalho*, 4 Mee. & W. 893; *Pardo v. Bingham*, supra, p. 693.

(n) 1 Mac. & G. 652.

sidering this latter chapter as applicable to the land only, and not to the relief of debtors, and the chapter 42 as applicable to the person only.

It may be added, in conclusion, that some of the enactments of the 3 & 4 Will. 4, c. 42, have been held to have a retroactive operation. Thus, under sect. 31, executors were held liable to costs in actions commenced before the act took effect (*o*). This statute passed on the 14th of August, 1833, but came into operation on the 1st of June preceding.

SECTION II.

The Interpretation of the Statutes considered in the preceding Chapters of this Book.

The authority
of the deci-
sions in Ire-
land.

As some of the laws considered in this section extend to Ireland, the judicial decisions thereon in that part of the United Kingdom will receive equal attention with those in England. In *Doe d. Newman v. Rusham* (*p*), Lord Campbell, C. J., said, "Having heard of a misconception which arose on a former occasion when I objected to the citation of a decision of an Irish court on a mere point of practice, I beg now to state that, in my opinion, the defendant's counsel were fully justified in citing this decision of an Irish court on the construction of an act of parliament which is common to both parts of the United Kingdom. Our procedure and theirs are regulated by different statutes, different rules and different usages; and on mere questions of procedure no assistance can be derived in one island from the decisions of the courts in the other. But in considering

(*o*) *Freeman v. Moyes*, 1 Ad. & E. 338, 896; *Pickup v. Wharton*, 2 Crom. & M. 406; *Grant v. Kemp*, 2 Crom. & M. 636; *Freeman v. Moyes* was questioned by

Parke, B., in *Pinhorn v. Souster*, 8 Exch. 138.

(*p*) 17 Q. B. 723, 736; S. C., 21 L. J., Q. B. 139, 145.

questions arising on statutes, or on the great principles of jurisprudence, which we have to interpret in common, I will take upon myself to say that we shall always be pleased to have assistance from the decisions of our learned brethren in Ireland, and that we shall treat with the same deference a judgment pronounced in any of the four courts in Dublin as if it had been pronounced in Westminster Hall." And in *Brittlebank v. Goodwin* (*p*), Giffard, V.-C., said, "Though this court is not bound by the decisions in Ireland, it would always treat them as and feel them to be of the greatest weight."

The statutes, the interpretation of which is to be considered in this section, may be divided into three classes: (1) those applied to the Crown and the Duke of Cornwall exclusively (*q*); (2) those applied to the Crown, the Duke of Cornwall, and the subject, both clergy and laity, in common (*r*); and (3) those applied to the subject only (*s*).

Interpretation
of three classes
of these sta-
tutes.

The statutes of the first class (*t*) are *in pari materia* (*u*), are of a remedial character, and are therefore to receive a benign and liberal interpretation (*v*). The subject matters to which they relate are expressed in general terms without any provision, similar to that in the statute relating to claims between subject and subject in general (*w*), declaring that those terms are to have a more extended meaning than their ordinary one. When, however, the difficulties and embarrassments admitted, as will be presently seen, to be inherent in provisions extending the meaning of terms beyond their ordinary one, are kept in mind, the

The statutes
of the first
class.

(*p*) 16 W. R. 696.

(*q*) 21 Jac. 1, cc. 2, 14; 9 Geo. 3, c. 16; 48 Geo. 3, c. 47; 7 & 8 Vict. c. 105, ss. 71, 73, 74; 23 & 24 Vict. c. 53; 24 & 25 Vict. c. 62.

(*r*) 2 & 3 Will. 4, c. 71; 2 & 3 Will. 4, c. 100.

(*s*) 3 & 4 Will. 4, c. 27, and incidentally, c. 42.

(*t*) Vide ante, p. 679. See *Tut-kill v. Rogers*, 1 Jones & Lat. 36.

(*u*) Supra, p. 679.

(*v*) Vide ante, p. 676.

(*w*) 3 & 4 Will. 4, c. 27.

omission of such clauses in these statutes is scarcely to be regretted. The legislature, indeed, in one instance, has indirectly declared, by a later statute, the meaning of certain terms employed in an earlier one. Thus the earlier statute (*w*), containing the law as to claims between the Duke of Cornwall and other persons, is applied in express terms to "mines, minerals, stone or substrata," and the later statute (*x*), declaring and defining the respective rights of her Majesty and of the Prince of Wales and Duke of Cornwall to the mines and minerals in or under land lying below high water mark within and adjacent to the county of Cornwall and for other purposes, declares (*y*) that, unless there is something in the context repugnant to such construction, the expression "mines and minerals" shall comprehend all mines and minerals, and all quarries, veins or beds of stone, and all substrata of any other nature whatsoever, and the ground and soil in, upon and under which, such mines and minerals, quarries, veins or beds of stone and other substrata lie (*z*); and in the statute (*a*) extending the provisions of the 9 Geo. 3, c. 16, to the Duke of Cornwall, the statute containing such declaration as to mines and minerals is recited with that declaration.

21 Jac. 1, c. 14. The 21 Jac. 1, c. 14, is a mere regulation of the proceedings at law, by information of intrusion or *scire facias*; it applies only, from the very terms of it, to those cases which can fitly and aptly be tried by information of intrusion . . . and touches upon no part of the jurisdiction of the Court of Exchequer considered as a court of equity, or as a court of revenue, having the superintendence of the possessions of the Crown. The object of this statute was to put a party who was contesting with the Crown in the same situation as a

(*w*) 7 & 8 Vict. c. 105, ss. 71,
72.

(*x*) 21 & 22 Vict. c. 109.
(*y*) Sect. 8.

(*z*) See *Baggett v. Meux*, 1
Phill. 628.

(*a*) 23 & 24 Vict. c. 53.

party contesting with any other plaintiff; but in equity the Crown and the subject always were on the same footing, and they are on the same footing now; there was no evil therefore to be remedied. At law, however, there was, arising from technical reasoning, a great injury accruing to a defendant in litigation with the Crown. The Crown's title was taken to be proved, unless a contrary title was set out and pleaded. That was a privilege which the Crown maintained against a defendant at law; but no such privilege has ever been asserted in equity (*b*).

The principle and policy of the other statutes of this class are to make sixty years' possession of the land conclusive proof of the subject's title, and the mode in which the possession of the subject has been acquired or commenced is not regarded. It may have been by tortious intrusion without colour of title, or it may have lawfully commenced by virtue of title from the Crown or the Duke, and have been unlawfully continued after the determination of that title. Defect of title and want of title, if there be any distinction between them, are equally contemplated, and both remedied. If we were to inquire what the phrase "defective title" means, we should probably find that the defect, whatever its nature or character, is resolved into a want or absence of title, either in the whole or some part of the estate (*c*). The right of the Crown and of the Duke to sue is taken away, the estate had or claimed by the subject and enjoyed for sixty years against the title of the Crown and of the Duke is confirmed absolutely and for ever, and that title is barred and extinguished and transferred to the subject (*d*). They do not provide for the protection of actual title in which there might be some defect or

The principle and policy of this class.

(*b*) 2 Mac. & G. 258.

(*c*) 11 Jones & Lat. 64, 66.

(*d*) 3 Inst. 190.

infirmity, but validate the title and estate which the subject claims to have (*e*).

Their retro-
active opera-
tion.

These statutes, in their general aspect, are framed so as to have generally a retroactive operation; that is, as regards the circumstances under which the title against the Crown, the Duchy of Lancaster, and the Duke of Cornwall commenced. But as to the earlier of these statutes, lapse of time has rendered any question as to such operation very improbable, if not impossible, and therefore needless to be here particularly considered.

The statutes of
the second
class.

2 & 3 Will. 4,
c. 71.

One of the statutes of the second class is the Prescription Act (*f*). There is no doubt much difficulty in carrying this statute into effect, and it affords an instance of the difficulty which attends the alteration of the law, where that alteration is for the purpose of putting an end to questions of doubt; indeed, in many cases, greater doubts are raised by the proposed alteration than had existed before (*g*). But whatever absurdities of construction may have been rendered unavoidable in other cases by the peculiar wording of the statute, it does not follow that we should extend those absurdities beyond what is necessary (*h*).

General inter-
pretation,

The construction of the act, which gives the words their ordinary meaning without introducing any inconsistency or absurdity in the working of the act, will be adopted, and the construction which unnecessarily attributes to the words a meaning other than their ordinary one, will be rejected (*i*), and the natural construction is to be abided by, unless made out that it would lead to some absurdity or manifest incongruity with the intention of the legislature to be collected from every part of the statute (*j*).

—and the
policy, of the
act.

The general policy of the act appears to found the rights it confers essentially on the uninterrupted and con-

(*e*) 1 Jones & Lat. 61, 62.

(*f*) 2 & 3 Will. 4, c. 71.

(*g*) Per Parke, B., 6 Exch. 831.

(*h*) Per Crompton, J., 10 Jur., N. S. 849.

(*i*) 12 C. B. 467.

(*j*) 4 Mee. & W. 500.

tinued enjoyment of them (*k*); to give that enjoyment the same effect as the evidence which would sustain a prescriptive claim before the act, except that the terminus of the statutory enjoyment must be a suit or action which discloses the nature of the claim, and gives an opportunity of litigating it (*l*); and to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance (*m*); and it is impossible to construe the act as intending that the periods of years therein mentioned should terminate at a different time from that fixed in express and positive terms (*n*). If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so (*o*).

To found a right under this statute, the claimant must show that it is a claim which might have been made at common law (*p*), and the whole purview of the act shows that it applies only to such rights as would, before the act, have been acquired by the presumption of a grant from long user (*q*). One object of the act was to shorten the time by which persons who had the access and use of light could acquire an absolute right to it (*r*); and the section relating to the access of light seems to simplify and almost new found the mode of acquiring the right to access of light. It founds it on actual enjoyment for the full period of twenty years without interruption, unless that enjoyment is shown to have been by consent or agreement expressly made by deed or writing—thus putting the right on a simple foundation and with the simplest exception (*s*).

The rights to which it applies.

This act was also intended to prevent old rights from Its effect on old rights,

(*k*) 12 C. B. 476.

(*l*) 12 C. B., N. S. 470.

(*m*) 1 Mee. & W. 99.

(*n*) Plowd. 374 a.

(*o*) 1 Mee. & W. 99.

(*p*) 10 C. B. 286.

(*q*) 5 Mee. & W. 233.

(*r*) 8 Exch. 864.

(*s*) 11 Exch. 863.

being defeated by proof that they could not by possibility have existed at the period of legal memory (*t*), to give to the enjoyment for the prescribed period the effect of absolute right (*u*), to make long enjoyment evidence of a right (*x*). It also gives the person who has had the user for the prescribed period the same right as if it had been given him by grant (*y*); relieves a party from the necessity of proving his right from time immemorial, and allows, as an equivalent, the proof of actual enjoyment for thirty years, so that no presumption is admissible (*z*), and shortens in effect the period of prescription, and makes that possession a bar or title of itself, which was so before only by the intervention of a jury (*a*); and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all; for titles by immemorial prescription are absolute and valid against all (*b*).

—on the nature of the right,

The act does not alter the nature of the right necessary to give a legal title. The party who avers the right must mean such as could be inferred to exist by custom, prescription, or non-existing grant; and the other party must show in his answer that there is no right of that nature (*c*). Neither does the statute make any difference in the various modes of defeating the user, except as it provides that it shall not be defeated by proof of origin at some time prior to the twenty years (*d*). The act merely alters the time of prescription, by shortening the time to different periods for different species of easements or prescriptive rights, and prevents claims by prescription being defeated by merely showing their origin at any time previously to these spe-

(*t*) 4 Hare & N. 18.

(*u*) 1 West, H. of L. Cas. 680.

(*w*) 9 Car. & P. 54.

(*y*) 10 Exch. 8.

(*z*) 3 Nev. & P. 260.

(*a*) 4 Tyrw. 507.

(*b*) 4 Tyrw. 511; 10 Exch. 8.

(*c*) 6 Moo. & W. 806.

(*d*) Sect. 2; 18 Q. B., N. S. 575.

cified periods. The only alteration the act has made with respect to prescription, except as to pleadings, is this, that whereas you must before have shown, not only pleaded it in many classes of actions, but have shown—the immemorial enjoyment of the right, it is sufficient now to allege the matter generally, and to show that it has been enjoyed for the requisite period by the party claiming it, and those whose estate he claims (*e*).

The statute, as expounded by several decisions, has considerably abridged the means of establishing incorporeal rights by proof of long enjoyment. The period of enjoyment must be computed backwards, not from the obstruction complained of, but from the bringing of the action (*f*). In *Wilson v. Stanley* (*g*), Pigot, C. B., said the law affecting incorporeal rights is in a state far from satisfactory. According to the exposition of the act in *Bright v. Walker* (*h*), two results follow from its enactments: first, presumptive title, founded on a presumed grant, cannot now be established at all by proof of long uninterrupted enjoyment alone; and, secondly, the prescriptive title, which the statute has given the means of establishing, can only be applied where the enjoyment has been such as to bind all estates comprising the whole fee simple in the servient tenement (*i*): and expressed a hope that the state of the law on this subject with reference to this act, the exposition of it in some cases, and the inconveniences which they unfold, may engage the attention of those whose province it is to consider the law, with a view to practical measures for its amendment.

—and on the
proof of long
enjoyment.

This statute was passed on the 1st of August, 1832, but the commencement of it was postponed until the

The retro-
active operation of the
act.

(*e*) 11 Jur., N. S. 777.

(*f*) *Ward v. Robins*, 15 Mee. & W. 287; *Richards v. Fry*, 7 Ad. & E. 698; 12 Ir. Com. Law

Rep. 356.

(*g*) 12 Ir. Com. Law Rep. 350.

(*h*) 1 Cr. M. & R. 211.

(*i*) 1 Cr. M. & R. 351.

2nd of November following (*k*). The rights to which this statute is applicable may be acquired by virtue of an enjoyment thereof for the specified periods, either wholly or partly before the passing of the act, for in this respect the language of the first three sections are retrospective. The words of the third section have been held to be clearly retrospective (*l*); and the words of the two preceding sections correspond with those in the section 3.

2 & 3 Will. 4,
c. 100.

The other statute of the second class is that for shortening the time for establishing claims of *modus decimandi*, and exemptions from or discharge of tithes (*m*).

Not to be interpreted by the report of the Real Property Commissioners.

In *Salkeld v. Johnson* (*n*), Pollock, C. B., said, "We shall not refer to the report of the Real Property Commissioners published shortly before the passing of this act, and to which it is supposed to have owed its origin, in order to explain its meaning; not conceiving that we can legitimately do so, however strongly we may believe that it was introduced in order to carry into effect their recommendation to establish a new Statute of Limitations for tithes.

Language of preamble.

The words "expense and inconvenience of suits," in the preamble, the Court of Exchequer understood to mean, not that the expense of suits (the number of them being supposed to remain as before), and the inconvenience of conducting them, might and ought to be prevented, but that expensive and inconvenient suits might and ought to be prevented (*o*). But Lord Cottenham said (*p*) the preamble is obviously inaccurate in speaking of shortening the time required for the establishment of claims of *modus* and discharge, none being required; but that it appeared to him to mean that the expense

(*k*) Sect. 10.

(*l*) *Simper v. Fbley*, 2 John. & H. 555.

(*m*) 2 & 3 Will. 4, c. 100.

(*n*) 2 Exch. Rep. 273.

(*o*) 1 M. & G. 252.

(*p*) 1 M. & G. 266.

and inconvenience of suits for tithes ought to be prevented by establishing certain limitations of time for those purposes, after which claims of moduses and discharges should not be questioned.

The words "by composition real" are introduced by way of example only, and the subsequent words "or otherwise" render them useless; the whole being tantamount to an enumeration of every possible ground of discharge, which would be equivalent to the simple words "all claims to discharge from tithes" (*q*). Terms of
sect. 1.

As respects moduses, Patteson, J., said (*r*), "I think that the statute only alters the period, and makes it no longer necessary to prove the payment of the modus from time immemorial." Effect as to
moduses.

As respects both moduses and exemptions, Wigram, V.-C., said (*s*), that the act in effect describes the sort of modus or exemption it means to aid. It is to be a modus or exemption by *composition real or otherwise*. The composition real is put as an example. The words *or otherwise* must mean other legal causes. The legislature could not have intended under those general words to create new causes for modus or exemption before unknown to the law (*t*). Moduses and
compositions.

A remarkable illustration of the difficulty, as Parke, B., said (*u*), attending the alteration of the law where the alteration is to put an end to questions of doubt, as well as an instance of great diversity of judicial opinion not less remarkable, is furnished by this statute. In the case of *Salkeld v. Johnson* (*x*), in the different courts both of law and of equity, the operation and the interpretation of this statute were the subjects of considerable discussion. The case came first before Wigram, V.-C., and he said that the construc- Diversity of
judicial opinion
on this
act.

(*q*) 1 M. & G. 268.

(*r*) 17 Q. B. 538.

(*s*) 1 Hare, 208.

(*t*) *Ib*.

(*u*) 6 Exch. 831.

(*x*) 1 Hare, 196; 1 Mac. & G.
242; 2 Exch. 278; 2 C. B. 749.

tion contended for by the defendant, and which was eventually established in that case (*y*), would "by a side wind sweep from the church a material branch of its revenues." But Lord Denman, in *Fellowes v. Clay* (*z*), said that the history of this act he there gave afforded legitimate proof that its object was announced beforehand, and must have been fully understood in both houses of parliament when they adopted the measure. The church was not taken by surprise, but represented by some of the ablest prelates that she could boast in any age, and defended and advised by men not more distinguished by learning than by attachment to her interests. She wisely sacrificed some "unjust advantages," and a small and doubtful portion of her revenue, to charity, religion and peace. In the same case, before the Common Pleas, Erle, J., said the question was whether enjoyment of an exemption or discharge from render of tithes for the statutable time is a title thereto. The words of the enactment, in their ordinary meaning, declare that the statutable time shall be a title. A title is the fact to which the right is by law annexed—which is to be pleaded as the foundation of the right in case it is litigated. The right in question here is a right to an exemption or discharge; and the statute annexes that right to the fact of enjoyment for the required time. The act of 2 & 3 Will. 4, c. 27, is *in pari materid*, the words are to the same effect as the statute in question, and the construction has been to make the statutable time a title to the right.

As to what it
applies.

The statute never was meant to apply to disputed titles to the ownership of tithes, or to make a bad title to a parcel of tithes good. It was enacted in case of *the occupier*, who had not paid tithe in kind at all, but been totally exempt, or had paid something in lieu of it for a long period; and relief is given by shortening the

(*y*) 1 Mac. & G. 242.

(*z*) 4 Q. B. Rep. 300.

time of prescription, and thus facilitating the proof of his title to exemption, or to pay the tithe otherwise than in kind (*a*). This act was only intended to apply to the case of tithes as a chattel, and to moduses, compositions real, and the like, and not to an estate in tithes as between adverse claimants. It provides for rights to tithes, and shortening the time for making out a claim in discharge of tithes, in which respect it is decidedly a Statute of Limitations as regards tithes, though it operates in a different way from the 2 & 3 Will. 4, c. 27, but does not anywhere provide strictly for the mere recovery of tithes as tithes in the ordinary sense of a render of tithes (*b*).

It is *acquiescence* in the *adverse* enjoyment of the exemption that is intended to make it absolute and indefeasible (*c*). It must be *an enjoyment as of right*; and we must construe this act in the same way as the 2 & 3 Will. 4, c. 71, which the courts have in many cases, beginning with *Bright v. Walker* (*d*), uniformly construed to mean, that the enjoyment of the profit or benefit contemplated by that act must be an enjoyment as of right (*e*). The simple fact of enjoyment of the discharge claimed for the prescribed period is all that need be pleaded and proved as an answer to a demand for tithes (*f*). But the exemption by nonpayment of tithes must be strictly made out. It will not do to give evidence of nonpayment for fifty years, and ask the jury to infer nonpayment for sixty years. There must be some evidence of nonpayment which extends to or exceeds sixty years. No doubt, a nonpayment sixty-two years before, and a continued nonpayment for forty years, would do, but there must be some actual evidence to carry it to or beyond the statutable period, which is less.

Acquiescence in, and nature of, the enjoyment under.

(*a*) Per Cur. *Knight v. Marquis of Waterford*, 15 Mee. & W. 426.

(*b*) 2 De Gex, M. & G. 469; *Dean and Chapter of Ely v. Cash*, 15 Mee. & W. 617.

(*c*) 2 Exch. 285.

(*d*) 1 C., M. & R. 211.

(*e*) 2 Exch. 286.

(*f*) *Salkeld v. Johnson*, 2 Mac. & G. 242; 2 C. B. 749.

But this is only a difficulty on the surface. If you set up immemorial nonpayment, you subject yourself to the hazard of its being broken in upon by a payment eighty years before. But the statutable limitation is exempt from that risk, and is therefore not unreasonably subjected to a stricter proof. A statutable limitation must be proved according to the terms of the statute (*g*).

Whether affected by
3 & 4 Will. 4,
c. 27.

The M. R. Lord Langdale (*h*) thought this statute repealed by the 3 & 4 Will. 4, c. 27. But the Court of Exchequer (*i*) thought not, and that construction of the latter statute was the more reasonable one, and had the additional advantage of reconciling both acts, and of removing what would otherwise seem an apparent neglect and carelessness on the part of the legislature. The court said that the operation of sect. 2 of 3 & 4 Will. 4, c. 27, as to land, which includes tithes, is to be confined to cases where there are two parties, each claiming an adverse estate in the tithes. Therefore a person who has received no tithes for twenty years cannot recover the possession of them from another who has, for twenty years, received those tithes from the terretenant; that this construction reconciles the 3 & 4 Will. 4, c. 27, s. 2, with Lord Tenterden's act for shortening the time of prescription in such cases, and for limiting it, in the case of tithes, to a period of sixty years and three incumbencies; for Lord Tenterden's act clearly applies to the tithes as a chattel, and provides a limitation to protect the terretenant in his prescriptive mode of rendering them to the clergyman or titheholder; and that it was very improbable that the legislature could have intended, *sub silentio*, to have repealed so important and well-considered an act, so recently passed.

Its retroactive
operation.

This last statute was passed on the 9th of August, 1832, but was not to be prejudicial to, or available for,

(*g*) Per Alderson, B., 8 Exch. 460.

v. Bliss, 5 Beav. 574.

(*i*) *Dean and Chapter of Ely*

(*h*) *Dean and Chapter of Ely*

v. Cash, 15 Mees. & W. 617.

any plaintiff or defendant in any suit or action, relative to any of the matters before mentioned (*j*), then commenced or thereafter to be commenced during the then session of parliament or within one year from the end thereof (*k*); the meaning of which is that the statute should not have, in any such suit or action, any retro-active operation (*l*). But it is apprehended that the rights to which this statute is applicable may be acquired by virtue of an enjoyment thereof for the specified periods, either wholly or partly before the passing of the statute; for the terms of it correspond with those of the chapter 71, which, as to rights acquired under the 3rd section of it, has been held to be clearly retrospective (*m*).

Of all the statutes the subject of this Book, the most important, perhaps, is that for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto (*n*).

The statutes of the third class.

The decisions upon this statute, both at law and in equity, are very numerous, and many of them present some remarkable instances of diversities of judicial opinion, and such as to lead to the remark by Pennefather, B., who said (*o*), "it is matter of regret, and must strike every person as not redounding much to the credit of the makers of this statute, made and passed nearly fifteen years ago, that in the decisions on it so much contradiction should have taken place." Some of these decisions indeed may appear even questionable, but, having been acquiesced in and received as authorities by courts of co-ordinate jurisdiction, and even by higher courts, and also by the profession generally, cannot, without producing insecurity to property and uncertainty in this branch of the law, be now disturbed. For as Alexander, C. B., said (*p*), it is not a wise ad-

The decisions on 3 & 4 Will. 4, c. 27.

(*j*) Sects. 1, 2.

(*k*) Sect. 3.

(*l*) Vide ante, p. 694.

(*m*) Vide ante, p. 704.

(*n*) 3 & 4 Will. 4, c. 27.

(*o*) *Hunt v. Bateman*, 10 Ir. Eq. Rep. 379.

(*p*) *M'Clel. & Y.* 590.

ministration of justice to oppose a current of authorities where they are to be found. If we did so, we could not expect that the decisions of the present day would be more binding on posterity; and the rule of justice would be ever fluctuating and uncertain. It is much wiser to adhere to prior determinations, although we cannot always understand the reasons on which they are grounded. Lord Denman, C. J., also forcibly observed (*g*), "Certainty in the law is of such paramount importance, that a decision, although questionable in itself, which has been acquiesced in by the co-ordinate courts, and has been acted on as law for any considerable period of time, may be better left for correction to some superior and more authoritative tribunal than departed from by the same court in subsequent cases; but, if these circumstances do not exist, and we should be satisfied on reconsideration that our earlier decision was erroneous, there is nothing which should prevent us from so declaring, when the same circumstances again present a case for our decision." Pennefather, C. J., also said (*r*), "I do not mean to say but that upon the consideration of a new statute, which has not been already rooted in authority, as it has been said, we are not bound to form the best judgment we can upon the subject; but to call upon us to give such a decision as appears good to ourselves—disregarding a decision pronounced after due deliberation, by a court of co-ordinate jurisdiction—I must confess that I regard a demand of that kind as a most dangerous one. I believe there is no sounder principle than that judges should endeavour to aim at a rule of decision known to all, not inconsistent with their consciences; *stare decisis* is old in the law, and it has been well said by Cicero, '*misera societas ubi jus vagum est.*' I do admit, if a case was decided on a new act of parliament, and if I

(*g*) 8 Q. B., N. S. 408.(*r*) 5 Ir. Law Rep. 77.

were called upon again to take the act into consideration, and that upon deliberate reflection it appeared to me a palpable misconstruction had been given to the statute, I should feel bound to give such a decision as conscience would require; but it should be shown plainly to my mind that injustice has been done, and that I should do right by correcting the mistake." The statute in question, however, being an imperial statute, must properly receive an uniform construction in England and in Ireland, and it has been the subject of much judicial comment. . . The leading object of the act manifestly was to establish a general rule for the quieting of titles, and giving security to long and undisturbed possession (s). The contradiction, however, said to have taken place may be rather the result of the difficulty of applying such a law to the almost infinite variety of cases to which it may be applicable and arising out of the numerous, complex, and ever-varying circumstances in which all property is, more or less, involved, than in any material want of clearness and precision generally in the statute itself.

It may be remarked that the 3 & 4 Will. 4, c. 27, does not expressly repeal any of the earlier statutes on the same subject, and, only so far as it is inconsistent with or repugnant to any of them, does it impliedly repeal them. It has assigned new periods of limitation, extended the law to matters not embraced by any of the earlier statutes, and to matters coming under the cognizance of courts of equitable and of ecclesiastical jurisdiction, and has limited the remedies to be applied. In *Eyre v. Walsh* (t), the court said a question of some nicety was whether the old Statute of Limitations for Ireland (u) was still in force, or was impliedly repealed by this statute of William the Fourth, as amended by the 1 Vict. c. 28, as is the case with the 8 Geo. 1, c. 4

Does not expressly repeal any of the earlier Statutes of Limitation.

(s) 9 Ir. Eq. Rep., N. S. 187. 353.

(t) 10 Ir. Com. Law Rep., N. S. (u) 10 Car. 1, c. 6.

(I.) (v). The Irish statute had not been expressly repealed, but a new period of limitation is given. The English statute (x) has been partially repealed (y).

Its interpretation clause.

Throughout this statute are used various terms, simple and compound, the sense of which, in accordance with the modern mode of legislation, is fixed by the statute itself. These terms in themselves have a definite and limited signification, but for the purposes of the statute it gives to them a more extended meaning and signification; subject however to this general qualification, that the nature of the provision or the context does not exclude the meaning and signification of these terms as interpreted by the statute itself. In the interpretation therefore of this statute, the terms of it, with the signification and meaning thus given to them, as well as such general qualification, should be carefully kept in view. Indeed, not only will a constant resort to these terms be necessary, but the very terms themselves, in their extended signification, will frequently require to be examined. The clause of the statute giving the meaning and signification of these terms as used in it forms a sort of legislative vocabulary to the statute, and the object of the legislature was, no doubt, to facilitate the application of the various enactments, and to avoid verbosity. It may, however, well be doubted whether this mode of legislation is not, to say the least, productive of a loose and careless use of language, in matters where, if anywhere, precision and perspicuity should be combined.

Interpretation clauses disapproved.

These interpretation clauses or glossaries (z) have been the subject of frequent judicial remark, and, in some instances, disapprobation. "They are," said Crompton, J. (a), "very often the most difficult part of

(v) 2 Jebb & Sy. 128.

(x) 21 Jac. 1, c. 16.

(y) Vide ante.

(z) 3 Dru. & War. 491.

(a) *Evelyn v. Whicford*, Ell. B. & E. 183.

the statute to construe." Lord Denman, C. J., speaking of a clause of this kind (*b*), said, "We cannot refrain from expressing a serious doubt whether these interpretation clauses of so extensive a range may not rather embarrass the courts in their decisions than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy; and the application of them to particular cases may give rise to endless doubts." Lord St. Leonards also remarked (*c*), "It has been very much doubted, and I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided, for they have attempted to put a general construction on words which do not admit of such a construction in the different senses in which they are introduced in the various clauses of an act of parliament."

The effect of these interpretation clauses has also been a frequent subject of judicial remark. "Although," said Lord St. Leonards (*d*), "the meaning of the words is defined by the statute, yet the statute declares (which would have been supplied if it had not been so expressed) that the words are not to have that meaning attached to them in the interpretation clause if a contrary intention appears." In the case of *Boyd v. The London and Croydon Railway Company* (*e*), Coltman, J., after remarking that such a clause there was confined to affirmative enactments, said, "In all cases we must give to words specified in that clause the full extent assigned to them; but it does not appear that, in other cases, we are to give a restricted and negative sense to a word when the object of the legislature requires a different construction." In another report of

Remarks on them.

(*b*) 7 Ad. & E. 491.

(*c*) 2 De Gex, M. & G. 471.

(*d*) 2 De Gex, M. & G. 471.

See also *Grant v. Ellis*, 9 M. & W. 118; 5 Ir. Law Rep. 76.

(*e*) 4 Bing. N. C. 674.

the same case (*f*), he is represented as saying, "The difficulty, in my opinion, arises out of the interpretation clause, which was intended to give facilities, instead of introducing uncertainty and difficulty. The words of the clause are wholly affirmative, and merely point out the construction to be given to certain words in particular cases. But, perhaps, it is not necessary to carry the signification of each word in the interpretation clause to its fullest extent; and if we feel obliged to give an interpretation which is not actually repugnant, it will not thence follow that we negative the clause altogether." And in a third report of the same case (*g*), he is represented as saying, "The interpretation clause, the object of which in an act of parliament is to aid the construction, is wholly affirmative in its nature. We must give effect to the words used to the full extent of that clause; but does it not follow that the language of the act is to be *restrained* by the interpretation clause, and deprived of their natural and usual signification, where they are obviously so used by the legislature." Patteson, J., also said (*h*) an interpretation clause does not restrain the meaning. And said Lord Denman, C. J. (*i*), "We apprehend that an interpretation clause is not to be taken as substituting one set of words for another, nor of strictly defining what the meaning of a word must be under all circumstances. We rather think it merely declares what persons may be comprehended within that term, where the circumstances require that they should." Cockburn, C. J., has expressed hope that the time will come when we shall see no more interpretation clauses, for they generally lead to confusion (*k*). But, as has been observed upon the Prescription Act (*l*), whatever term the act uses, if it explains the meaning of that

(*f*) 7 Law J., N. S. 242, 244.

(*g*) 6 Scott, 161.

(*h*) 7 Q. B., N. S. 979.

(*i*) 7 Ad. & E. 491.

(*k*) 6 B. & S. 801.

(*l*) 2 & 3 Will. 4, c. 71.

term, it is quite immaterial whether the word may or may not be used in any other sense, where it is not explained what the meaning of the term is (*m*).

The principle and policy of a statute frequently form a key to the expressed intention of the legislature, and will frequently afford, in the interpretation, material aid. "The legislature," said Erle, J. (*n*), "appears to have considered the Statutes of Limitations to be enactments in furtherance of justice. They have intended to take away absolutely every impediment to the operation of those enactments in every case." "This statute," said Foster, B. (*o*), "evinces an anxiety to shorten those periods of limitation which it found established, and to introduce new periods of limitation where no limitation existed before." Brady, L. C., also designated the statute (*p*) as an act whose principle and policy it is to discourage and to bar stale demands—to relieve the possessors of property from such claims, even when the precise amount of them, and the particular claimants, were ascertained, or even specified in the instrument of charge. Foster, B., also said (*q*), "Perhaps no other statute ever was enacted which aimed so much to set aside the law that it found established as the act in question. To get rid of ancient law, where it had become unsuited to modern convenience, is the character of the statute, from one end of it to the other. It has accordingly abolished every form of real action except three. It has annihilated above sixty of the most venerable writs known to our law. It has swept away the doctrines of continual claim and *possessio fratris*, and wholly altered the law respecting the effect of entries, and of discontinuance, and of warranty, and of descents cast, and of the possession of joint tenants and tenants in common, and of permissive occupation, and of ad-

The principle and policy of this act.

(*m*) 1 West, H. of L. Cas. 678.

(*n*) 8 Ell. & B. 488.

(*o*) 2 Jebb & Sy. 127.

(*p*) 11 Ir. Eq. Rep. 146.

(*q*) 2 Jebb & Sy. 188.

verse possession ; and it has altered the periods of limitation, and the conditions under which they apply to remainder-men, and to persons under disabilities."

"This statute, and the chapter 42," said Wigram, V.-C. (r), "are Statutes of Limitation, and were not passed merely for the protection of parties in possession of the land." And in *Cannon v. Rimington* (s), the court said, "The principle of the act, generally speaking, is to bar a person, who has a right to enter, if he does not exercise that right in a given time, not to bar those who cannot exercise that right, '*contra non valentem agere, non currit præscriptio*.'" To this rule there are express enactments to the contrary, as in sects. 21, 22, &c., which must of course avail when they apply. But it is a strong thing to deprive a man of a right who has had no opportunity of exercising it ; and the general principle of the act is to extinguish rights which those who possess them have suffered to lie dormant. Therefore, where an estate tail has been discontinued, and the right of entry taken away by such discontinuance, on the 1st June, 1835, the issue in tail may have his formedon within twenty years after the death of the tenant in tail who made such discontinuance, and as against such issue the time does not begin to run during the life of such tenant in tail.

And object.

The object of the statute, said Erle, C. J. (t), and a very beneficial one, is to prevent the bringing up of dormant titles, after many years have been allowed to elapse. It requires that persons who have rights shall enforce them within certain limited periods. It takes up a large class of cases in which parties who have been long in uninterrupted possession have great difficulty in showing that their possession was adverse. It is in these sections that there has been great capability of

(r) *Hunter v. Nockolds*, 18 L. J., N. S., Chan. 409.
(s) 12 C. B. 18.

(t) *Locke v. Matthews*, 13 C. B., N. S. 761.

carrying the provisions of the act far beyond the intention of the legislature. Foster, B., with reference to charges on land provided for by section 40, also said (*u*), "I believe it was the true object of the statute to put an end to the possibility of land continuing to be bound for such long and almost indefinite periods of time; and to supply altogether new tests for determining under what circumstances land should become relieved from such liens, and to declare that such circumstances should henceforward be the facts of nonpayment or nonacknowledgment for twenty years consecutively; and to enact in effect that no other circumstance should operate to preserve the lien."

This act, said the court in *Hunter v. Nockolds* (*v*), has no preamble, and the title cannot be resorted to in construing the enactments; but all the earlier provisions relate to the limitation of actions and suits relating to real property. To relieve debtors was no part of the objects of this statute. It is applicable to land only. And Wilde, C. J. (*x*), alluding to sect. 3 of 3 & 4 Will. 4, c. 42, said the sole object of the legislature was, to discharge parties from demands that might and ought to have been enforced at an earlier period, and thus we have plain means of ascertaining the intention with which they used the words "cause of action," that is, a cause of action capable of being enforced.

The doctrine of equitable extension cannot be applied to this statute, for there is nothing on which to found it. Therefore, an action, which before the time appointed for the statute to come into operation would abate by the death of a sole plaintiff, and could not be continued since the statute by a writ of journeys' accounts, would seem also to be now incapable of continuance by such a writ on the death of a sole defendant (*y*).

Its interpretation. Has no preamble.

Cannot be extended by equitable interpretation.

(*u*) 2 Jebb & Sy. 119.

(*v*) 1 Mac. & G. 651.

(*x*) 4 C. B. 655.

(*y*) *Davies v. Lowndes*, 1 Phill. 328.

Its language.

The language adopted by the legislature in every statute demands, of course, primary and especial attention. When the language of a statute is not clear, a construction destructive of right ought not to be adopted; on the contrary, where the question for consideration is, whether existing right and property are to be taken away and extinguished by a new statute of dubious import, it ought to be strictly construed and a plain provision shown to that effect. We are not to assume an intention in the legislature unexpressed, and thereupon interpret doubtful language and novel phrases to carry that assumed intention into effect, in order to extinguish property and right (*z*). When the phraseology of a statute is new, and not very precise or clear, it is to be construed with due regard to the preservation of existing right, to prevent injustice, and certainly not to strain it in order to produce the contrary effect (*a*). A party is not to be stripped of his undoubted property or rights by the ambiguous terms of an act of parliament (*b*). As regards the intention of the legislature, Pennefather, C. J., said (*c*) that ought to be collected from the act itself,—from what the legislature has said either in its recitals or in its express enactments; and Brady, L. C., also said (*d*) it is of the greatest importance to the security of property and the peace of families that the fullest effect should be given to the very beneficial statute by which a possession and enjoyment for twenty years and upwards is clothed, as it ought to be, with an unimpeachable title.

Not to be interpreted by the Report of the Real Property Commissioners.

In the interpretation of this statute, in some of the earlier cases upon it, reference was sometimes made to the first report of the Real Property Commissioners; but although in terms of eulogy, yet with a disclaimer of adopting that report as a guide to, or allowing it to

(*z*) 2 Jebb & Sy. 109.

(*a*) *Ib.* 118.

(*b*) Per Ball, J., 2 Jebb & Sy.

104.

(*c*) 2 Jebb & Sy. 148.

(*d*) 9 *Ir. Eq. Rep.* 409.

exercise any influence on, the judicial mind in such interpretation.

Thus, Pennefather, C. J., said (e), "We ought not too much to look out of the statute to what learned men have said or thought antecedently to its passing. The history of acts of parliament is sometimes referred to; in the construction of old statutes, contemporaneous exposition is frequently of the greatest value. But we are not to go too far in attending to what has been said or done before: the legislature has put its fiat upon the enactment, and before the measure has become the law of the land. What has been previously said or done may have been altered, or, possibly, altogether abandoned before the contemplated measure has passed into a law; and we ought therefore to look mainly at the language of the legislature itself to find out and interpret its meaning." On the same occasion, Foster, B., said, "the bill, it is well known, was brought into parliament in order to give effect to that portion of the recommendations of the first report of the commissioners, appointed by the crown to inquire into the state of real property, which relates to the limitations of actions and suits respecting real property, and the simplifying the remedies for trying the rights thereto; and I believe I may add further, as a matter of fact, that the framers of this act of parliament were no other than the commissioners themselves. The report of the commissioners on which this act was founded is most certainly not a document that can control its construction, but under the circumstances it will not misbecome us to look into the report, as a document well deserving respectful attention. The commissioners comprised within their number some of the most eminent conveyancers in England. And they sought out and have published in their appendix the opinions and advice of all such persons as were best

(e) 2 Jebb & Sy. 148.

qualified to assist them; and the result has been an exposition of the law of real property, perhaps, as instructive and important as any other treatise in the law." He also said, after alluding to the changes effected in the law, "the statute adopts and carries into execution the recommendation of the first report of the commissioners appointed to consider the state of the law respecting real property; but extensive as are these changes they are not all that were then in the mind of the legislature connected with the subject of that first report; for in the same session they passed twenty-eight statutes, equally founded on that report, and equally adopting its recommendations, by one of which the ancient law of dower was wholly new-modelled, and by the other some of the most fundamental maxims of the law of inheritance were set at nought. What Lord Coke might have thought of these opinions I stop not to conjecture." Torrens also said, "With respect to the history of the act, and the report of the Real Property Commissioners, I cannot permit my mind, as far as it is legally constituted, to adopt as a guide to the construction of the act the opinions which certain commissioners may have entertained. I have no such judicial knowledge of the Real Property Commissioners as should operate to prevent my giving that construction to the act which would prevent mischievous consequences." In the construction of the 2 & 3 Will. 4, c. 100, Pollock, C. B., also rejected that report as a guide (*f*).

How far retroactive.

The question under what circumstances and to what extent the 3 & 4 Will. 4, c. 27, is or is not retroactive, has been frequently discussed. The statute was passed on the 24th of July, 1833, but the operation of its principal enactments were postponed until future periods. Thus, some of those enactments (*g*), as to their operation, are postponed until the 1st of January follow-

(*f*) Vide ante, p. 704.

(*g*) See sects. 2, 24, 30, 33, 39, 40, 41, 42, 43.

ing; the operation of another of those enactments (*h*) is postponed until the 1st of January, 1835; the operation of this last enactment is, in certain cases, postponed (*i*) until the 1st of June, 1834, and, in certain other cases which may arise long after even this last day (*k*), still further postponed. The natural import of that is, that those enactments shall have no operation till the days named, and therefore shall not take effect by being pleaded in any action commenced before that day; such at least would be the construction, unless there were other words to the contrary (*l*), and that the legislature intended to mitigate any supposed hardship which might arise from an *ex post facto* operation of the statute generally.

That the statute was intended to be retroactive Generally.
generally appears not only by its general scope, but by its main provisions, and especially by the section 36. By that section all real and mixed actions, Sect. 36.
with only four exceptions, and all complaints in the nature of such actions, with only one exception, are abolished, and no such action or complaint was to be brought after the 31st of December, 1834, or, in the particular cases provided for by the section 37, after the 1st of June, 1835, and in certain other cases even after that day. If, therefore, the statute were not to have a retroactive operation, the existence of rights would, in many instances, be preserved, whilst all the means by which those rights could be asserted and established would have been swept away. The legislature never could have contemplated such a result. The abolition indeed of those means was tantamount to an extinction of the rights themselves; for properly speaking a right without a remedy is synonymous with no right at all, or, in positive law, whatever it may be in logic, a contra-

(*h*) Sect. 36.

(*i*) Sect. 37.

(*k*) Sect. 38.

(*l*) Per Tindal, C. J., 3 Ad. & E. 895.

diction. No reasonable ground therefore appears for considering this statute to be prospective only. If indeed it were so considered many titles to real property would be thrown into great uncertainty (*n*).

Secta. 2 and 3.

The act generally, and most of the clauses, really are retrospective; for instance the second and third clauses are clearly so (*n*). The first of its principal enactments (*o*) has been held to have a retroactive operation (*p*); and, as a necessary consequence, those enactments which are subordinate and ancillary to that principal enactment have such an operation (*q*). So other sections grounded on, although not strictly subordinate or ancillary to, such principal enactment (*r*). In all or most of these cases the circumstances contemplated by the statute were entirely or partly existing at the time when it passed or came into operation, and proceedings to establish the right were taken afterwards.

Sect. 7 partially so only.

The retroactive operation of section 7 is, however, only partial—that is, in only those cases where the tenancy at will existed at the time when the act passed, or is created subsequently (*s*), and not in those cases where before the passing of the act the original tenancy

(*m*) See *Goodall v. Sherratt*, 3 Drew. 220.

(*n*) Per Kindersley, V.-C., 3 Drew. 220; 1 Jur., N. S. 58.

(*o*) Sect. 2.

(*p*) *Nepean v. Doe d. Knight*, 2 Mee. & W. 894; *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008; *James v. Salter*, 2 Bing. N. C. 505; *Goodall v. Sherratt*, 3 Drew. 220.

(*q*) Sect. 8, see *Goodall v. Sherratt*, 3 Drew. 220. Sect. 7, but only in some cases, *Doe d. Goody v. Carter*, 9 Q. B., N. S. 863; *Doe d. Dayman v. Moore*, 9 Q. B. 555; *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Doe d. Lansdell v. Gower*, 17 Q. B. 589. Sect. 8, *Doe d. Jukes v. Sumner*, 14 Mee. & W. 39. Sect. 9, *Doe d. Angell v. Angell*, 9 Q. B., N. S. 328. Sect. 12,

Culley v. Doe d. Taylerson, 11 Ad. & E. 1008; *Woodroffe v. Doe d. Daniel*, 15 Mee. & W. 769; *Goodall v. Sherratt*, sup.; *Tidball v. James*, 29 L. J., N. S., Exch. 91, explained in *Murphy v. Murphy*, 11 L. T., N. S. 189; *Stewart v. Marquis of Coningham*, 1 Ir. Eq. Rep., N. S. 534. Sect. 13, *Doe d. Palmer v. Eyre*, sup. See also, 16 Mee. & W. 712. Sect. 16, *Devine v. Holloway*, 14 Moore, P. C. C. 290.

(*r*) Sects. 21, 22, *Goodall v. Sherratt*, sup.

(*s*) *Doe d. Goody v. Carter*, 9 Q. B., N. S. 863; *Doe d. Dayman v. Moore*, 9 Q. B., N. S. 555; *Doe d. Palmer v. Eyre*, 17 Q. B., N. S. 366; *Doe d. Lansdell v. Gower*, 17 Q. B., N. S. 589.

had been determined and a new one created and was existing when the statute passed (*t*). Had a retroactive operation been given to this section in such cases, a right which existed at the time when the act passed would have been taken away. In *Doe d. Evans v. Page* Lord Denman said (*u*), this section is in terms only applicable to the case of a future, or at most of an existing, tenancy at will, and not to the case of a tenancy at will which had been determined, and was not existing, when the act passed. A different construction, even if the words permitted it, would cause the greatest hardship; for a person, who as the law stood before the passing of the act was in ample time to bring his ejectment and recover property that undoubtedly was his, would by the operation of the statute be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons, who would be otherwise affected by it, to assert their rights.

In *Devine v. Holloway* (*x*), the court said that the Sect. 16. observations of the court in *Doe d. Evans v. Page*, as to tenancies at will determined before the act passed, are inapplicable to the 16th section.

It has been contended that the 17th section is prospec- Sect. 17. tive only, and that therefore, notwithstanding the case of *Doe d. Carbyn v. Bramston* (*y*), which treated the section as retrospective, the question that this section applies to only those disabilities arising subsequent to the act is still open (*z*). But if the 16th section be retrospective, the 17th section is so also. It is admitted that section 16

(*t*) *Doe d. Evans v. Page*, 5 Q. B. 767; *Doe d. Bennett v. Turner*, 7 Mee. & W. 226; *Doe d. Burgess and Harrison v. Thompson*, 5 Ad. & E. 532; *Doe d. Thompson v. Thompson*, 6 Ad. & E. 721; *Doe d. Birmingham Canal Co. v. Bold*, 11 Q. B. 127; *Rundall v. Stevens*, 2 Ell. & B. 641; *Hodgson v. Hooper*, 6 Jur., N. S. 911; *Locke v. Matthews*, 13 C. B., N. S. 753; *Hogan v. Hind*, 14 Moore, P. C. C. 811.
 (*u*) 5 Q. B. 772.
 (*x*) 14 Moore, P. C. C. 290.
 (*y*) 8 Ad. & E. 68.
 (*z*) 2 Smith's L. C., 5th edit. 628.

is so; but the 17th section is not a substantive enactment, but a qualification of the 16th section, and, therefore, as the 16th section is retrospective so is the latter. Although standing alone, its terms, independent of its relation to the preceding section, may be in themselves prospective only.

Sect. 23.

Whether the 23rd section be retroactive has been doubted. In *Penny v. Allen* (a), Lord Cranworth, L. C., said it did not apply there even if it could be construed as having a retrospective operation, and that the object of the section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder. There are prior clauses in the statute which show what the operation is as to the issue, and those clauses seem to be studiously worded, so as to be confined only to the case of persons entitled after the estate tail. Lord St. Leonards considers this clause as not having a retroactive operation. "It could hardly be held," he said (b), "to apply to a case where the twenty years had wholly elapsed before the passing of the act, because not only the language of the section does not embrace such a case, but the substitution for Recoveries Act makes good defective fines and recoveries, where such was the intention, and gives confirmation in certain cases in express words to voidable estates *already created*, or thereafter to be created, by tenant in tail."

Sections 40 and 42 not retroactive.

Two of the principal enactments, however (c), have been considered as not having a retroactive operation. In these cases, the circumstances contemplated by the act were existing, and proceedings had been taken to

(a) 7 De Gex, M. & G. 426.

(b) Treat. on New Statute relating to Property, 2nd ed. 89.

(c) Sect. 40, *Furran v. Otte-*

well, 2 Jebb & Sy. 97. Sect. 42; see *Paddon v. Bartlett*, 3 Ad. & E. 684.

establish the right before the statute came into operation.

The 3 & 4 Will. 4, c. 42, has been, and in the prior chapters of this Book some of its enactments have been, frequently considered in connection with the statute which has been the subject of the last preceding observations, and therefore the judicial opinions which have been expressed upon the policy and the interpretation of this chapter 42 will be here noticed. "The sole object of the legislature," said Wilde, C. J. (*d*), speaking of this statute, "was to discharge parties from demands that might and ought to have been enforced at an earlier period." "This statute," said the court (*e*), "is certainly *in pari materiâ* with the 21 Jac. 1, c. 16, and had it been framed in this way—that all the provisions of the statute of James shall extend to actions on specialties, with this difference, that such actions shall be brought within twenty years of the cause of action instead of six years—it could scarcely have been said that the construction put upon the statute of James did apply to cases arising under the statute of William." The same court, on a subsequent occasion, also said, "the language of this statute is the same, *mutatis mutandis*, as that used in the statute of James, and the object seems to have been to add actions upon specialties and some others to those mentioned in that statute. It would, therefore, seem but reasonable that the same construction should be put upon the provisions of the latter statute as has been put upon the former, so far as such a construction may be applicable. . . . The same equitable construction which has been applied to cases of actions upon contracts under the statute of James should be applied to actions upon contracts under the 3 & 4 Will. 4, c. 42." In *Paget v. Foley* (*f*),

The policy and the interpretation of 3 & 4 Will. 4, c. 42.

(*d*) 4 C. B. 665.

(*f*) 2 Bing. N. C. 290.

(*e*) 4 Exch., N. S. 629.

Tindal, C. J., said, the words of the 3rd section of this statute are not merely negative words, but import an affirmative also; not merely that a plaintiff may not sue for rent accruing more than ten years before, but that he may sue for all that time to come for rent in arrear at the time the act passed.

"This," said the Vice-Chancellor of England (g), "is a remedial act, and I cannot help thinking that it is absolutely necessary for this court to adopt many of the provisions of it as well as of the 27th chapter of the same session, changing of course the mere formal language, and adapting it to the practice of this court. I think that if, after this statute had passed, an action could have been brought on the judgment, there would be no question but any judge would have allowed the jury to exercise their discretion upon the point of interest." "The policy of a law," said Wigram, V.-C. (h), "which, in the absence of acknowledgment of a debt, discharges both the person and property of the debtor, and limits the demand of the creditor after a certain period of non-claim, is intelligible and sound; but the language of an act of parliament must be very clear which could persuade me that the legislature, expressly intending to keep the debt alive, and to preserve the remedies against the person of the debtor, intended that the securities for the debt in the hands of the mortgagor himself should be discharged from the contract between the parties, and be made liable to the debts circuitously only through the judgment upon the bond or covenant."

(g) 8 Sim. 598.

(h) 2 Hare, 339.

CHAPTER X.

THE STATUTES OF LIMITATION AS BETWEEN VENDORS AND PURCHASERS.

POSSESSION in general has been already considered, and the advantages conferred by, and the benefits derived from, it have been shown (*a*). We have also shown when and in what cases it has received, by legislative enactment, additional force, and also the position of the possessor, as to the right and title of the persons against whom possession has been held, after the time of limitation has expired (*b*).

The importance of possession can be scarcely too highly estimated, and has been repeatedly declared by the courts of every jurisdiction, and they have also as frequently recognized the obligation of maintaining possession of long duration. It is favoured in law as an argument of right (*c*), and, when long continued, *omnia præsumi debent solenniter esse acta* (*d*). In equity, in favour of purchasers for valuable consideration especially, is so favoured. The voice of the law indeed, is, *caveat emptor*; the voice of equity is, *teneat emptor*, though his title be bad and defective, if he has not purchased with iniquity (*e*).

In all cases of temporal rights, the courts of law consider *quieta, longa, et pacifica possessio* as the best evidence of title: . . . one of the wisest and most solid

(*a*) Book II.

(*b*) Chap. VII. of this Book.

(*c*) 2 Inst. 118.

(*d*) Ib. 862.

(*e*) *Furness v. Rotherham*, 2 E. & Y. 158, 1 Eden, 276, S. C.

—as evidence
of title.

rules of the law. They will therefore presume stale titles in writing barred by other conveyances probably lost; because the possession contrary to those conveyances, cannot otherwise be accounted for. Possession is so strong a title, that a judge may have emphatically said, he would presume an act of parliament to support and confirm it. Possession is a title to recover upon, and, *primâ facie*, evidences the mere right, except in the case of tithes: for there it evidences no right, though it should be *ultra memoriam hominis quieta et pacifica*. Where possession evidences a right, there may be reason to presume somewhat to answer a stale and latent title (*f*). And on a very recent occasion Lord Westbury said, "I know no greater obligation that lies upon a court of justice than that of supporting long-continued enjoyment by every legal means, and by every reasonable presumption. And I dwell more particularly upon this obligation to presume everything that can be reasonably supposed to have existed in favour of long possession, because I do not find that principle quite so prominent as I could have desired in the judgments of the court below, which, when they refer to this head of judicial decision, rather run off into the conclusion that the action is barred by negative prescription. The difference is very great. Negative prescription proceeds upon the foundation of the illegality and the imperfect obligation created by the thing that is challenged; but the doctrine of presumption goes on the footing of validity, and upholds validity by supposing that every thing was present which that validity required. The great principle, *Omnia præsumuntur ritè fuisse acta*, is the principle that ought to be observed, and not the ground that the thing itself was challengeable, but that the challenge is cut off by prescription" (*g*).

Difference between negative prescription and presumption.

(*f*) Per Lord Keeper Henley, *Fanshaw v. Rotheram*, *supra*.

(*g*) *Lee v. Johnston*, L. R., 1 S. A. 426, 435.

On the mere possession, or the receipt of the profits of land, is founded a presumption of ownership in fee, in the possessor or the receiver (*h*). The strength of the presumption is measured by the duration, and the character, peaceable, or the reverse, of the possession (*i*); and the presumption stands upon the clear principle, built upon reason, the nature and character of man, and the result of human experience, that a man will naturally enjoy what belongs to him (*k*).

Possession we have hitherto considered chiefly as between the possessor and the persons whose right and title have been affected by it. Having been of such duration as to exclude the right and title of those persons, and the possessor having exercised the chief incident of property, the power of alienation, we conclude this work with a consideration of the relative rights and duties of himself and the person to whom the alienation is made, as respects the title to be shown by the possessor to the property the subject of his possession.

Title by possession between vendors and purchasers.

SECTION I.

Titles and Questions of Title depending on the Statutes of Limitation.

It was long doubtful under the law existing before the 3 & 4 Will. 4, c. 27, whether a court of equity would force upon a purchaser a title, which depended on adverse possession. But it was ultimately settled that a clear title, and just as good as any other title,

Purchaser must take such a title,

(*h*) *Denn v. Turnerell v. Barnard*, Cowp. 595; *Jayne v. Price*, 5 Taunt. 326; *Crease v. Barrett*, 1 C., M. & R. 981; *Doe v. Coulthard*, 7 Ad. & E. 239; *Metters*

v. Brown, 32 L. J., Ex. 138.

(*i*) Co. Litt. 5 b; *Furnshaw v. Rotheram*, 1 Eden, 276.

(*k*) Per Lord Eldon, 12 Ves. 245.

may be acquired by adverse possession, and that a purchaser would be bound to take such a title (l).

In deciding whether a purchaser is compellable to take a title the court has to consider, first, whether, *de facto*, a title has been made out, and, secondly, whether there is sufficient evidence of title to satisfy the court, before it obliges an unwilling purchaser to accept the title. With regard to the first, it is a matter of perfect indifference how the title is made out, provided the purchaser gets a title. Whether it be by escheat, abatement, disseisin, intrusion, possession and non-claim, or destruction of contingent remainders, is a matter of no consequence, provided there be a valid legal title; whether the evidence is sufficient is a different question (m).

—and when
acquired
against,

The Statutes of Limitation applicable to the possessions of the Crown and of the Duke of Cornwall respectively, as we have already seen (n), not only bar the remedy of the Crown and of the Duke, but establish the title of the person who has obtained, and held for the prescribed period, the possession by adverse title; and a title depending on those statutes is such a title as a purchaser will be compelled to accept (o).

—or indefea-
sible by, the
Crown,

A purchaser will be compelled to take a title created by the Crown defeasible by entry, when the right of entry can be no longer exercised either by the Crown or by its grantee. Thus the Crown granted certain mills in fee, reserving a fee-farm rent, with a right of entry in certain events, and afterwards sold and conveyed the rent. Many years afterwards the mills were sold under a decree of the Court of Chancery in a suit for the administration of the estate of the owner of them, and the purchaser objected to the title because

(l) See *Scott v. Mason*, 3 Dru. & War. 383, 2 Con. & L. 185, & C.

(m) *Ib.*

(n) Vide ante, pp. 563, 567.

(o) *Tidwell v. Rogers*, 1 Jo. & Lat. 38.

that such right of entry was in either the Crown, or its grantee. But the court held that the right was not in either; not in the grantee of the rent because the grant of the rent was not a grant of a reversion within the 32 Hen. 8, c. 34, and also because the owner of the rent could not have, at the suit of the Crown, that decree upon which alone the right of entry was to be founded; and could not be in the Crown, because the exercise of the right would defeat the grant of the rent; and therefore the purchaser was compelled to take the title (*p*).

A title depending upon the Statute of Limitations 3 & 4 Will. c. 27, which not merely bars the remedy and operates as a defence, but also extinguishes the right and title of the person out of possession, and as against him at least, whatever may be the effect against others, gives to the title of the person in possession legal force and validity (*q*), is such a title as a court of equity will force upon a purchaser (*r*).

—or under
8 & 4 Will. 4,
c. 27.

A title depending on the operation of the Statute of Limitations, and which a purchaser will be compelled to accept, must be, however, one in which the circumstances are such as to bring it clearly within the statute. If the effect of the statute be doubtful a court of equity will not force the title on a purchaser (*s*). The case of *Hyde v. Dallaway* was determined on the sect. 28 of the 3 & 4 Will. 4, c. 27, in a suit by vendors for specific performance of the contract for sale, and the master reported that they had not shown a good title. An exception to the report was overruled, and the court held that the possession of the mortgagee was not adverse, and said the sect. 28 supposes the existence of a person

But the statute
must clearly
apply.

(*p*) *Flower v. Hartopp*, 6 Beav. 476.

(*q*) Vide Chap. VII. Sect. II.

(*r*) *Scott v. Nixon*, 3 Dru. & War. 388, 2 Con. & L. 185, *S. C.*; *Kirkwood v. Lloyd*, 12 Ir. E. R. 585; *Stewart v. Marquis of Co-*

nyngbam, 1 Ir. C. R. 584; *Hyde v. Dallaway*, 6 Jur. 119, 2 Hare, 528, *S. C.*

(*s*) *Hyde v. Dallaway*, 2 Hare, 528, stated and commented on, ante, p. 587; *Kirkwood v. Lloyd*, 12 Ir. Eq. R. 596.

to whom the acknowledgment is to be made as well as of the party to make it; there must be not only a party to redeem but one to be redeemed. The mortgagee became, in effect, the tenant for life of the equity of redemption; the remainderman might therefore properly look upon him as holding in that character, and would not necessarily refer his possession to any other title. It would be a surprise upon the parties interested in the property, after the expiration of the life interest, if they were told that the tenant for life had another and an adverse title, by means of which they were to be barred and the tenant for life to acquire an absolute interest(*t*). The property was afterwards sold, with a stipulation that the concurrence of the parties interested in the equity of redemption, in the conveyance should not be required, and on a bill for specific performance the purchaser was ordered to pay the costs occasioned by his allegation that the plaintiffs were bound to make a good and marketable title; and a reference to the master to inquire whether a good title could be made, according to the conditions, was directed (*u*).

Hyde v. Dallaway.

The case *Hyde v. Dallaway*, as an interpretation of the sect. 28 of the 3 & 4 Will. 4, c. 27, is opposed to *Browne v. The Bishop of Cork* (*x*), which was not cited. The primary object of that section, which relates exclusively to the rights of mortgagees and is not controlled by the sect. 15 (*y*), is to limit a time for the redemption of mortgages, and, as a necessary incident to that object, to assign the terminus from which the computation of that time is to be made. That terminus is either the commencement of the possession or the receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, or the time at which an acknowledgment, or, if more than one, the last of

(*t*) *Hyde v. Dallaway*, 2 Hare, 528.

(*u*) *Ib.*; 4 Beav. 606.

(*x*) 1 Dru. & Wal. 700.

(*y*) *Browne v. The Bishop of Cork*, *supra*.

them, of the title of the mortgagor or of his right of redemption is given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person in writing signed by the mortgagee or the person claiming through him. In *Hyde v. Dallaway* the principal ground of the decision seems to have been, not with reference to that primary object, but with reference to the mere incidental fact of the person to be redeemed and the person to redeem having become, even after the period of limitation had commenced, one and the same (z). But in *Browne v. The Bishop of Cork*, the mortgagee, at the time when his possession commenced, sustained the character of both such persons, and Lord Plunket held, that the case was concluded by this statute, and that the possession of the mortgagee, under such circumstances, barred the persons claiming the equity of redemption. He distinguished the case from *Raffety v. King* (a), and the other cases establishing the principle recognized and acted upon in *Hyde v. Dallaway*. In the latter case the mortgage was created by the tenant for life and the remainderman, but in both those cases the possession was taken by the mortgagee under his mortgage title. In the case before his Lordship, however, the possession was taken by the mortgagee, not in that character but in his character of purchaser of the life estate in the equity of redemption, having obtained, contemporaneously with his purchase, an assignment of the mortgage for his protection as purchaser, and his Lordship, whilst recognizing the distinction, thought it immaterial since the statute.

In *Kirkwood v. Lloyd* the question arose, what is the effect of payment of interest on a judgment after the lapse of twenty years, not as between the person paying and the person paid, but as between third parties and

Title affected
by judgment
on which in-
terest paid
after twenty
years.

(z) On this point see the case, and ante, pp. 526, 527.

(a) 1 Keen, 601.

the person paid? And the Lord C. Brady said, that is a question of difficulty. If the case turned on the effect of a payment before the expiration of twenty years, then *Mahon v. Davoren* (y) and *Warrens v. O'Shea* (z), and other cases, would show that such a payment would keep alive the judgment as against all persons; or at least its effect would be too doubtful to allow the court to force the title on a purchaser; but there is no decision to show what is the operation of such a payment after twenty years.

Mortgage more than twenty years old, not barred by time, *per se*.

A mortgage dated more than twenty years ago is not, *per se*, evidence, as against a purchaser, to show that it is paid off or barred by the Statute of Limitations. There ought to be at least some evidence to show that no interest, or no part of the principal, has been paid (a), or no such acknowledgment in writing as the sect. 40 of the 3 & 4 Will. 4, c. 27, specifies has been given within the last twenty years.

Contract may be to take title, although not clearly within the statute.

By contract, however, either in express terms, or as the necessary consequence of the provisions of it, a purchaser may be, of course, bound to accept a title depending on, although not clearly within the Statutes of Limitations (b).

The title must be supported by evidence,

In deciding whether a purchaser is compellable to take a title, the court has to consider whether there be sufficient evidence of title to satisfy the court. Long possession without any deed is more regarded than ancient deeds without possession (c); and when it has been long and uninterrupted and in opposition to them, the importance they would have, if followed by possession, is lost (d).

—which may be by affidavit only.

A purchaser will be compelled to take a title resting on possession under the Statute of Limitations where

(y) 2 H. & B. 523.

(z) 5 Law Rep., N. S. 77.

(a) *Spinner v. Walsh*, 10 Ir. Eq. R. 386.

(b) See *Hyde v. Dallaway*, 4 Beav. 606, ante, p. 732.

(c) 2 Inst. 118; 1 Eden, 296.

(d) Turn. & R. 218.

the evidence of such possession is by affidavit only (e). A purchaser under a decree of the court is not bound to rely upon mere affidavits. In a court of law they are mere waste paper. But a court of equity is frequently obliged to act upon facts making out a title which have been proved by affidavit, which constitute a title only there. But if the purchaser chooses to have a more solemn mode of establishing these facts he can require it. The purchaser is not bound to accept the affidavits in proof of these facts. He may insist upon having a regular examination of witnesses in the usual manner in which any other question of fact is proved in the master's office. The mode of proof, therefore, rests entirely on the purchaser's consent. Courts of equity, however, frequently compel an acceptance of a title resting on affidavits; for instance, in questions of identity (f), of receipt of rent (g), and of seisin (h); and must, of course, in such cases, act with great caution, and ought to be satisfied, before compelling a party to take such a title, that the facts as proved are such as to sustain the title, in the event of any adverse claim being set up (i).

SECTION II.

The Time for which Titles are to be shown as regards the Statutes of Limitation.

A peaceable possession of sixty years has been said to make a right; for 32 Hen. 8, c. 2, took away the writ of right and the formedon, and the 21 Jac. 1, c. 16, took away the entry and assise (h); and many persons

Sixty years the rule with reference to the old Statutes of Limitation,

(e) *Scott v. Nixon*, 3 Dru. & War. 388, 2 Con. & L. 185, S. C.

(f) See *Flower v. Hartopp*, 6 Beav. 476; *Cottrell v. Watkins*, 1 Ib. 361.

(g) *Moulton v. Edmonds*, supra.

(h) *Scott v. Nixon*, supra.

(i) *Scott v. Nixon*, supra. See also *Moulton v. Edmonds*, supra.

(k) Jenk. Cent. Ca. 49, p. 26; *Widdowson v. The Earl of Harrington*, 1 Jac. & W. 532.

have considered sixty years' possession as the best title which can be made (*l*). This, however, must mean adverse possession, and even such a possession would not be, in all cases, sufficient (*m*).

The former of these two statutes, however, did not bar any right, but only prohibited the bringing of a writ of right, and the 3rd section extended to only actions and not to entries of a person's own possession; and, therefore, although a person had been out of possession of land for sixty years, yet if his entry was not tolled he might enter and bring any action of his own possession (*n*).

—founded on the time for bringing writs of right.

Those writs, as to amendment, regarded differently by different judges.

The opinion that such a possession was the best of titles was probably founded on the old Statutes of Limitation. By the 32 Hen. 8, c. 2, a writ of right must have been founded on the actual (*o*) seisin of an ancestor of the demandant within sixty years (*p*), and a possessory action on the like seisin within fifty years (*q*), computed, in each case, from the teste of the writ, or, in either case, on the seisin of the demandant himself within thirty years so computed (*r*). And in a writ of intrusion the seisin of a tenant for life was not the seisin of an ancestor of the remainderman (*s*). A writ of right also was commonly regarded as a very vexatious proceeding (*t*), as generally seeking to disturb a possession which had continued for a considerable time (*u*), and therefore not to be lightly disturbed (*x*), because of the consequence of overturning titles which have been supposed to exist for near sixty years (*y*). Hence

(*l*) 3 Bl. Com. 196; per Sir J. Mansfield, C. J., *Charlwood v. Morgan*, 1 New R. 66.

(*m*) 1 Pres. Ab. 250, 251, 267.

(*n*) *Bevil's case*, 4 Co. 8.

(*o*) *Ib.*

(*p*) Sect. 1.

(*q*) Sect. 2.

(*r*) Sect. 8.

(*s*) *Widdowson v. The Earl of*

Harrington, 1 Jac. & W. 532.

(*t*) Per Heath, J., *Adams v. Radway*, 1 Marsh. 602.

(*u*) *Ib.*

(*x*) Per Park, J., *Worley v. Blunt*, 9 Bing. 635, 640; *Widdowson v. The Earl of Harrington*, 1 Jac. & W. 532, 556.

(*y*) Per Sir J. Mansfield, C. J., *Charlwood v. Morgan*, *supra*.

the dislike, disfavour, and discouragement constantly shown to the writ, and the jealousy with which the proceedings were watched (z). Very great difficulties also attended the proceedings, and the courts, although they would aid a demandant in any difficulty arising therein by the act of God, acting on the maxim, *Actus Dei nemini facit injuriam* (a), almost invariably refused him any aid for correcting any of his own errors therein (b). Wood, B., indeed, is said to have had always a bias on the subject of amending writs of right (c), and is reported to have said on one occasion that he could not agree that writs of right were to be discouraged by the judges, while they remained part of the law of the land, and that he was not for holding it so strict, but that the rule to amend was sometimes to be allowed (d). This bias, if, on the grounds assigned by the learned judge, his view can be properly so designated, has been shared by another distinguished judge in a still later case, and on similar grounds but more explicitly stated. Thus, Best, C. J., said (e), "Whilst the law allows writs of right to be brought at any time within sixty years from the accruing of the title, judges cannot assent to the argument, that all such writs are vexatious, and that the courts should take advantage of any accident to prevent the demandant's proceeding. Judges have no authority to defeat a legal right, because they think it ought not to be insisted on. If a law be inconvenient or unwise, I am not for defeating it by indirect means. Let the full force of its inconvenience be felt, and then the legislature will alter it in a proper manner."

(z) *Slade v. Dowland*, 2 Bos. & P. 570; 1 N. R. 66; *Jennings v. Earl Howe*, 5 L. J., N. S., Ch. 12, 14; *Miller v. Miller*, 2 Scott, 116.

(a) *Tooth v. Bagwell*, 8 Bing. 178.

L.

(b) *Adams v. Radway*, supra; *Worley v. Blunt*, supra; *Jennings v. Earl Howe*, supra.

(c) 9 Bing. 642.

(d) 1 Roscoe, Real Prop. Actions, 179.

(e) *Tooth v. Bagwell*, supra.

Why amendment refused.

The principal ground for not permitting an amendment in a writ of right was that it would tend to relax that vigilance which ought always to attend the assertion of contested claims; for it is essential to justice that the claimant should, if possible, come to the court within such time as his opponent may reasonably be expected to be furnished, if at all, with the evidence on which he may defend his right (*f*).

Disregarded as to equitable claims.

As regards the limitation of time applied to claims of an equitable nature courts of equity never regarded writs of right, or writs of formedon, or others of the same nature, but constantly acted upon the statute of James (*g*).

Right of entry existing after sixty years.

Notwithstanding these old Statutes of Limitation and the considerations in connection with them here noticed, however, after an adverse possession of sixty years by which the highest remedy, the writ of right, was barred, under some circumstances a right of entry might still be put in force (*h*). Thus the possession might be by or against the owner of an interest less than the fee by virtue of such interest, and might continue for more than sixty years without effect upon the subsequent interests (*i*).

A title for sixty years generally accepted.

The general rule, however, has always been that a title should be shown for at least sixty years, and when so shown, and supported by proper documentary evidence, and accompanied by possession consistent with such evidence, and the evidence is free from inference impeaching, such title is generally accepted (*k*). If a title for that period rest upon mere possession, unaccompanied by any such evidence, a rigid and jealous investigation is essential for the protection of a pur-

Cautions when resting on mere possession.

(*f*) *Worley v. Blunt*, 9 Bing. 685.

(*g*) Per Lord Redesdale, *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 192.

(*h*) *Bevil's case*, 4 Co. 8, 11 b;

1 Pres. Ab. 21; 1 Real Property Rep. p. 40.

(*i*) 1 Pres. Ab. 250, 251, 267.

(*k*) See Hayes on Conv. 442, 4th ed.

chaser. The possession may have originated by or against a person having only a particular estate, which may be still in existence, and the title, good *prima facie*, may prove, on the production of the earlier evidence of it, defective (*l*). But in the absence of such evidence a purchaser will be compelled to take even such a title (*m*). The precautions, however, formerly taken with such titles for the safety and protection of the purchaser are no longer available (*n*); for fines and recoveries have been abolished (*o*), the Statute of Fines (*p*) has been practically repealed, a feoffment deprived of its tortious operation (*q*), and increased jealousy and vigilance in the investigation of such a title are therefore now demanded on the part of a purchaser.

This period of at least sixty years is the approved technical rule among conveyancers (*r*), and a title shown for only forty-three years was considered by Lord Eldon (*s*) as undoubtedly imperfect and unquestionably not satisfactory.

A title for less period is imperfect.

When a title is shown for this period, mere suggestions of probable or possible grounds of claim in other persons (*t*), or of suspicion of fraud (*u*), or of doubts or rumours of defects (*x*), under circumstances existing more than sixty years ago, and which, if well founded, would affect the title, were and are disregarded. Moral, and not mathematical, certainty must govern (*y*).

The rule not affected by suggestions of defects, &c.

Various reasons for this rule that the title was to be

Reasons for the rule.

- (*l*) 1 Pres. Ab. 247.
- (*m*) Ib. 23, 249, 250, 251.
- (*n*) Ib. 24, 255.
- (*o*) 3 & 4 Will. 4, c. 74.
- (*p*) 4 Hen. 7, c. 24.
- (*q*) 8 & 9 Vict. c. 106, s. 4.
- (*r*) See *Barnwell v. Harris*, 1 Taunt. 430; 2 V. & P. 132, 10th ed.; 1 Pres. Ab. 20.
- (*s*) *Paine v. Meller*, 6 Ves. 349.
- (*t*) *Lydall v. Weston*, 2 Atk.

- 19; *Hillary v. Waller*, 12 Ves. 229; *Sperling v. Trevor*, 7 Ib. 497.
- (*u*) 2 Atk. 20; *M^cQueen v. Farquhar*, 11 Ves. 467; *Moulton v. Edmonds*, 29 L. J., Eq. 181, 1 De Gex, F. & J. 246, S. C.
- (*x*) See *Lord Braybrooke v. Inskip*, 8 Ves. 417.
- (*y*) 2 Atk. 19.

shown for sixty years have been assigned. Sometimes the reason assigned is the duration of human life(*z*), sometimes that the old Statutes of Limitation(*a*) could not confer a title in a shorter period(*b*), and sometimes on both grounds(*c*). One ground, said Lord Lyndhurst(*d*), and the real cause, said Lord Campbell(*e*), of the rule is the duration of human life; for where, as in the statute just mentioned, there are exceptions by reason of infancy and other disabilities, there the estimate of the life of man is still to be regarded as measuring the period during which a title must be proved(*f*). Probably the limitation to a writ of right originally suggested the period of sixty years, but did not, or did not alone, furnish the ground and reason of the practice which requires the title to be deduced for that period at least(*g*). The rule, however, was never founded on any assumption that it gave a title absolutely safe against eviction(*h*); but, admitting that a title shown for sixty years might still be the subject of eviction, assumed that, after sixty years, there was a moral certainty that no facts existed which could support eviction(*i*). The probability is that when it became necessary to establish the minimum extent to which abstracts of title under all circumstances should reach, sixty years were fixed on as being the period when an adverse possession would confer an unimpeachable title(*k*), or, as there can be no mathematical certainty(*l*), yet as there may be a strong probability, in favour of a title being good, as the favourable result of a scrutiny, prosecuted through the *res*

(*z*) 1 Hayes on Conv. 564, 5th ed.

(*a*) 38 Hen. 8, c. 2; 21 Jac. 1, c. 16.

(*b*) 2 V. & P. 132, 10th ed.; 1 Pres. Ab. 250; Mr. Tyrell's Ev. Real Prop. Rep. App. 1, 326.

(*c*) 9 Jarm. Conv. 417, 418.

(*d*) *Cooper v. Emery*, 1 Phill. 398, 399.

(*e*) *Moulton v. Edmonds*, 1 De G., F. & J. 246; 29 L. J., Eq. 184; 8 W. R. 153, 154, & C.

(*f*) *Ib.*

(*g*) 1 Hayes' Introd, 282, 5th ed.

(*h*) *Ib.* 281.

(*i*) 4 Drew. 183, n.

(*k*) 9 Jarm. Conv. 417, 418.

(*l*) Per Lord Hardwicke, 2 Atk. 20.

gestæ of the last sixty years was thought to afford that probability, and as the more extended the period of research, the greater the assurance of safety, convenience required and practice established a conventional limit (*m*).

It has often been lamented, said Lord Mansfield, C. J. (*n*), by eminent lawyers, that the period of possession sufficient to acquire a title has not been shortened, who have thought that sixty years was too long a time for titles to remain *in dubio*; for whilst the title to lands remains in doubt, all improvements are suspended. The public interest, as well as that of the possessors, requires that titles should be rendered infeasible as soon as those who may be supposed to have claim on estates have had a fair opportunity of establishing them (*o*).

The Real Property Commissioners in their first Report said (*p*), although a claim can seldom be set up after twenty years' adverse possession, the instances, however rare, in which this occurs, render all titles questionable to the extreme limit ever allowed; and upon the sale and mortgage of land, it is necessary that every title should be strictly examined for nearly a century, and that evidence should be given of the enjoyment, transfer and devolution of the property during that long period. This is a main cause of the length of abstracts necessary to be laid before conveyancers, and of the harassing and expensive inquiries to which abstracts give rise. Many titles, notwithstanding long enjoyment, are found unmarketable From the increased frequency with which real property changes hands in modern times the length of abstracts is a growing evil which calls loudly for remedy; and

(*m*) 1 Hayes' Intro. 282, 5th ed.

(*n*) *Charlwood v. Morgan*, 1 New Rep. 66.

(*o*) Per Best, C. J., *Tooth v. Bagwell*, 8 Bing. 878.

(*p*) Page 41.

we think some diminution of this evil will be provided by shortening and making uniform the period of limitation, although to guard against the fabrication of fee simple titles by persons in possession under particular estates, it will still be requisite to investigate titles for a greater number of years than the period of limitation which may be prescribed.

The rule not altered by 3 & 4 Will. 4, c. 27.

On this Report was founded the 3 & 4 Will. 4, c. 27, and immediately after this statute was passed, the question, whether the effect of that statute would be to shorten the period of time for which titles had been previously shown, or, in other words, whether the old period of sixty years, or the extreme period of limitation mentioned in this statute (*g*), forty years, or some intermediate period, should be the rule, was much discussed (*r*). Some persons contended that the effect of this statute was to diminish the period, and that a title for forty years ought to be deemed a marketable title (*s*). Others considered that the old rule would remain unaltered (*t*), and an eminent authority on such questions considered that, in practice, a convenient rule would be adopted, which, taking a middle course, would perhaps be to furnish a fifty years' title in ordinary cases (*u*).

Cooper v. Emery.

At length the question as to the effect of the statute in this respect was raised in and decided by the case of *Cooper v. Emery* (*x*). Lord Lyndhurst, C., there said, "It was supposed that by the operation of the act it was not necessary that the title should be carried back as formerly to a period of sixty years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but, after considering it, I am of opinion that

(*g*) Sect. 17.

(*r*) See 2 V. & P. 135, 10th ed.

(*s*) See *Cottrell v. Watkins*, 1 Beav. 361; *Hodgkinson v. Cooper*,

9 Beav. 304; *Doe d. Corbyn v. Bramston*, 3 Ad. & E. 63.

(*t*) 1 Hayes' Introd. 281.

(*u*) 2 V. & P. 138, 10th ed.

(*x*) 1 Phil. 388.

the statute does not introduce any new rule in this respect; and that to introduce any new rule shortening the period would affect the security of titles. One ground of the rule was the duration of human life, and that is not affected by the statute. It is true that in other respects the security of a sixty years' title is better now than it was before. But I think that is not a sufficient reason for shortening the period—for adopting forty years, or, as it has been suggested by a high authority, fifty years instead of sixty. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration."

In *Moulton v. Edmonds* (*y*), Lord Campbell, C., said, he did not think that "this statute in any respect abridges the period of sixty years for which previously a good title must have been proved by the vendor, although attempts have been made by very distinguished persons to abridge this period, so as to facilitate the transfer of real property." For although the statute bars, as well estates and interests lying behind an estate tail which is barred (*z*), as those in reversion expectant on a lease for years in writing reserving a yearly rent of twenty shillings and upwards where the rent is wrongfully received by any person (*a*), yet even a possession of sixty years and upwards may still happen to be by or against only a tenant for life, or a tenant for years, other than under such a lease, and therefore of no avail against those claiming in remainder or reversion, after such tenancies. And Lord Langdale, M. R., on one occasion (*b*) said, "I am very much afraid that one of the objects of the legislature in passing the act of limitation referred to, namely, that of shortening the period of deducing titles, has not been effected in consequence of the construction put upon that statute."

(*y*) 1 De G., F. & J. 246, 250.

(*z*) Sects. 21—23.

(*a*) Sect. 9.

(*b*) *Hodgkinson v. Cooper*, 9 Beav. 309.

And does not exclude a title being required for a longer period.

Neither does the statute preclude a purchaser from requiring, under all circumstances, the title to be deduced for more than sixty years. The rule is, in effect, that a purchaser cannot object to a title shown for that period, and not that he cannot, under any circumstances, call for the title to be shown for a longer period, as he certainly may under some circumstances (*c*).

Nature of titles to renewable leaseholds.

The title to renewable leaseholds frequently involves embarrassing questions. These interests are most commonly derived from spiritual and eleemosynary corporations and other public bodies (*d*), but sometimes from private persons; and the lessors, from motives of kindness, or of interest, or both, having renewed, in many cases for generations (*e*), such interests, the lessees under such leases have been sometimes led to conceive and cherish the hope or the expectation that renewal would be continued as of course, and on that hope or expectation have expended considerable sums in substantial and permanent improvements of the property, granted subleases of parts of it at improved rents, mortgaged it, have made it a provision for their families, and eventually have regarded the privilege of renewal as a *right*, and thus, in effect, subverting the title of the lessors (*f*). When, however, on application by the lessees for renewal, the lessors were found to be entitled either to demand increased fines on renewal (*g*), or to refuse renewal altogether on any terms (*h*), the precise nature of the interest of the lessees clearly appeared, and unless such hope or expectation had been superinduced by assurances, or hints, or other conduct, of the lessors inducing the lessees to expend their money upon the pro-

(*c*) See *Parr v. Lovegrove*, 4 Drew. 170.

(*d*) See 9 Beav. 304; 1 Coop. Rep. Ch., temp. Lord Cottenham, 97; 17 W. R. 701.

(*e*) See 1 Coop. *supra*, 121.

(*f*) See *Clayton v. Att.-Gen., Earl Grey and others*, *infra*.

(*g*) *Ib.*

(*h*) *Ib.*; *Hayward v. Pile*, 17 W. R. 701.

perty or to do anything by which they would become losers, and especially to produce a gain to the lessors(i), neither the mere practice of renewal, however long continued(k), nor the fines paid on renewal(l), nor the expenditure by the lessees from time to time in improving the property(m), have been sufficient to convert that privilege into a right(n).

A right of renewal most commonly arises by express contract; and the extent of the right so created is a frequent subject of litigation; and the question has generally been whether the renewal is to be for a limited period only, or perpetual(o); and unless the contract show clearly that the renewal is to be perpetual the courts lean against giving that interpretation to the contract(p); although when the contract is clear that the renewal is to be perpetual, they will enforce it(q). But even in that case the lessee, to entitle himself to the renewal, must strictly perform his part of the contract(r).

Right of renewal commonly arises by contract.

(i) See *Floyd v. Buckland*, 2 Freem. 268; *Allan v. Bower*, 3 B. C. C. 148; 1 Coop. Rep. Ch., temp. Lord Cottenham, p. 124; 1 Arnold's Rep. 314.

(k) See *Baynham v. Guy's Hospital*, 8 Ves. 298; *Eaton v. Lyon*, Ib. 694; *Iggulden v. May*, 9 Ib. 331, 333; 1 Eden, 346, 349, n.(a); 14 Ves. 332 *et seq.*; 4 Cru. Dig. 429, 430.

(l) *Redshaw v. Governor and Company of Bedford Level*, 1 Eden, 346; 349, n.(a); 3 Atk. 87, 88; *Iggulden v. May*, supra; *Browne v. Tighe*, 8 Bli. 272; 2 Cl. & F. 396, 408, *S. C.*; 4 Cru. Dig. 427.

(m) See 14 Ves. 339 *et seq.*; 1 You. & C., Ex. Rep. 92; 4 Cru. Dig. 424.

(n) *Clayton v. Att.-Gen., Earl Grey and others*, 1 Coop. Rep. Ch., temp. Lord Cottenham, 97, Arnold's Rep. 312, n.(o), *S. C.*; *Simpson v. Clayton*, 4 Bing. N. C. 758, Arnold's Rep. 299, *S. C.*

(o) *Hinde v. Skinner*, 2 P. W. 196, on which see 3 Atk. 88; *Iggulden v. May*, supra; *City of London v. Mitford*, 14 Ib. 41; 1 Eden, 346, 348, n.(a); *Browne v. Tighe*, supra; 13 Beav. 478; 18 Ib. 404; *Hare v. Burges*, 4 K. & J. 45.

(p) *Russell v. Darwin*, 2 B. C. C. 639, n.; *Tutton v. Foote*, Ib. 636; 2 Cox, 174; *Hyde v. Skinner*, supra; *Iggulden v. May*, 7 East, 237; 2 New Rep. 449; 9 Ves. 315; *Moore v. Foley*, 6 Ves. 232; *Dowling v. Mill*, 1 Mad. 541; *Maxwell v. Ward*, 13 Pri. 674; *Browne v. Tighe*, supra; *Price v. Ashketon*, 1 You. & C., Ex. 82.

(q) *Furnival v. Crewe*, 3 Atk. 88; *Willan v. Willan*, 16 Ves. 84; *Browne v. Tighe*, supra; *Hare v. Burges*, supra.

(r) See *Gourlay v. The Duke of Somerset*, 1 Ves. & B. 68; *Thompson v. Guyon*, 5 Sim. 65; *Rubery v. Jervoise*, 1 T. R. 229; *Job v. Banister*, 2 K. & J. 374.

Length of title
to such lease-
holds.

The question, however, of most frequent occurrence in connection with the immediate subject of this section is, for what period, in the absence of express stipulation, the title to these renewable leaseholds is to be shown. The renewed lease, especially when granted by a corporation or other public body, is very commonly expressed to be made in consideration of the surrender of the former lease, and the former lease may have been made in such terms as that all persons acquiring the renewed lease are or may be, in equity, affected by equities attaching to the lease surrendered (*s*). A purchaser of the renewed lease has thus imposed upon him the obligation of investigating the title to the surrendered lease, and has often been compelled, for his own protection, to carry the investigation to such an extent as to entail upon the seller very great hardship and expense (*t*), and an unwilling purchaser might insist on such production so far as to render the making out of the title impracticable; but that by no means necessarily follows, for when you go to a certain extent back, the court necessarily resorts to favourable presumptions, arising from the facts brought before it (*u*). With the aid of these presumptions and the provisions of the modern Statute of Limitations applied to equitable titles (*x*), these titles, as to this question, have been placed on a more certain foundation.

(*s*) *Coppin v. Fornyhough*, 2 B. C. C. 291.

(*t*) See *Hodgkinson v. Cooper*, 9 Beav. 304.

(*u*) 9 Beav. 310.

(*x*) 8 & 4 Will. 4, c. 27, m. 24 —27.

APPENDIX.

STATUTES.

21 JAC. 1, c. 14.

An Act to admit the Subject to plead the general issue in Informations of Intrusion.

I. Where the King out of his prerogative royal may enforce the subject in informations of intrusion brought against him to a special pleading of his title, the King's most excellent Majesty, out of his gracious disposition towards his loving subjects, and at their humble suit being willing to remit a part of his ancient and regal power, is well pleased that it be enacted, and be it enacted That whensoever the King, his heirs or successors, and such from or under whom the King claimeth, and all others claiming under the same title under which the King claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements or hereditaments within the space of twenty years before any information of intrusion brought or to be brought to recover the same, That in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially, and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found or adjudged for the King.

On informations for intrusions on Crown lands, whereof the king hath been out of possession for twenty years, the defendant may plead the general issue, and retain possession till title found for the king.

II. And be it further enacted, That where any information of intrusion may fitly and aptly be brought on the King's behalf, that no scire facias shall be brought whereunto the subject shall be forced to a special pleading, and be deprived of the grace intended by this act.

Scire facias shall not be brought instead of information.

15 CAR. 1, c. 1.

The Statute for Ireland is in the same terms.

9 GEO. 3, c. 16.

An Act to amend and render more effectual an Act made in the Twenty-first year of the Reign of King James the First, intituled, "An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever."

Preamble.

The Crown disabled to sue, or implead any person for any manors, lands or hereditaments, &c., where the right hath not or shall not first accrue and grow within sixty years next before the commencing such suit, &c.,

WHEREAS an act of parliament was made and passed in the twenty-first year of the reign of King James the First, intituled, "An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever; and thereby the Right and Title of the King, his Heirs and Successors, in and to all Manors, Lands, Tenements, Tithes and Hereditaments (except Liberties and Franchises) were limited to Sixty Years next before the beginning of the said Session of Parliament; and other Provisions and Regulations were therein made, for securing to all his Majesty's Subjects the free and quiet Enjoyment of all Manors, Lands and Hereditaments, which they, or those under whom they claimed, respectively had, held, or enjoyed, or whereof they had taken the Rents, Revenues, Issues or Profits, for the Space of Sixty Years next before the beginning of the said Session of Parliament: And whereas the said Act is now, by Efflux of Time, become ineffectual to answer the good End and Purpose of securing the general Quiet of the Subject against all Pretences of Concealment whatsoever:" Wherefore be it enacted by the King's most excellent Majesty, by and with the assent and consent of the Lords spiritual and temporal, and the Commons, in this present parliament assembled, and by the authority of the same, that the King's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question or implead, any person or persons, bodies politic or corporate, for or in any wise concerning any manors, lands, tenements, rents, tithes or hereditaments whatsoever (other than liberties or franchises) or for or in any wise concerning the revenues, issues or profits thereof, or make any title, claim, challenge or demand, of, in or to the same, or any of them, by reason of any right or title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof; unless his Majesty or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by force and virtue of any such right or title to the same, the rents, revenues, issues or profits thereof, or the rents, issues or profits of any honour, manor or other hereditament, whereof the premises in question shall be part or parcel, within the said space of sixty years;

or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or have or shall have stood insuper of record within the said space of sixty years: And that all and every person or persons, bodies politic and corporate, their heirs and successors, and all claiming by, from or under them, or any of them, for and according to their and every of their several estates and interests which they have or claim to have, or shall or may have or claim to have, in the same respectively, shall, at all times hereafter, quietly and freely have, hold and enjoy, against his Majesty, his heirs and successors, claiming by any title which hath not first accrued or grown, or which shall not hereafter first accrue or grow, within the said space of sixty years, all and singular manors, lands, tenements, rents, tithes and hereditaments whatsoever (except liberties and franchises) which he or they, or his or their, or any of their ancestors or predecessors, or those from, by or under whom they do or shall claim, have or shall have held or enjoyed, or taken the rents, revenues, issues or profits thereof, by the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof; unless his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, by, from or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, in the said manors, lands, tenements, rents, tithes or hereditaments, by force of any right or title, have been or shall have been answered, by virtue of any such right or title, the rents, revenues, issues, or other profits thereof, within the said space of sixty years; or that the same have or shall have been duly in charge, or stood insuper of record as aforesaid, within the said space of sixty years: And furthermore that all and every person and persons, bodies politic and corporate, their heirs and successors, and all claiming or to claim by, from or under them, or any of them, for and according to their and every of their several estates and interests which they have or claim, or shall or may have or claim, respectively, shall, for ever hereafter, quietly and freely have, hold and enjoy, all such manors, lands, tenements, rents, tithes and hereditaments (except liberties and franchises) as they now have, claim or enjoy, or hereafter shall or may have, claim or enjoy, whereof his Majesty, his progenitors, predecessors or ancestors, or whereof his Majesty, his heirs or successors, or he or they by, from or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, or some of them, by force of some right or title to the same, have not or shall not have been answered, by virtue of such right or title, the rents, revenues, issues or profits thereof, within the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof, nor the same have been or shall have been duly in charge, or stood insuper of record as aforesaid, within the said space of sixty years, against all and every person and per-

—and the subject secured in the free and quiet enjoyment thereof, as well against the Crown, &c.,

—as against all persons claiming any estate or

interest therein, by colour of any letters-patent, or grants upon suggestion of concealment, wrongful detaining, &c., for which judgment hath not or shall not be given for the Crown within sixty years before the commencing such suit.

sons, their heirs and assigns, having, claiming or pretending to have, or who shall or may have, claim or pretend to have any estate, right, title, interest, claim or demand whatsoever, of, in or to the same, by force or colour of any letters patents or grants, upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, or by, from or under any patentees or grantees, or any letters patents or grants, upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, of or for which said manors, lands, tenements, rents, tithes and hereditaments or any of them, no verdict, judgment, decree, judicial order upon hearing, or sentence of any court now standing in force, hath been had or given, or any such verdict, judgment, decree, judicial order upon hearing, or sentence of court, shall hereafter be had or given, in any action, bill, plaint or information, in any of his Majesty's courts at Westminster, for or in the name of the King's Majesty, or any of his ancestors, progenitors, predecessors, heirs or successors, or of any of the said patentees or grantees, or for their or any of their heirs or assigns, within the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof as aforesaid.

In what cases the rents and profits of manors, &c. shall be deemed to be duly in charge.

II. Provided always, and be it enacted, That where the rents, revenues, issues or profits of any manors, lands, tenements, tithes or hereditaments, are or shall be in charge, by, to or with any auditor or auditors, or other proper officer or officers of the revenue, such rents, revenues, issues and profits, shall be held, deemed and taken to be duly in charge within the meaning and intent of this act; any usage or custom to the contrary notwithstanding.

Cases wherein reversions or remainders in the Crown, of any manor, &c., are not liable to be impeached by this act.

III. Provided always, That this act, or any thing therein contained, shall not extend to bar, impeach or hinder his Majesty, his heirs or successors, of, for or from any manors, tenements, rents, tithes or hereditaments, whereof any reversion or remainder now is in his Majesty, for or concerning the said reversion or remainder; nor of, for or from any reversion or remainder, or possibility of reversion or remainder, in any of his Majesty's progenitors or predecessors, or ancestors, which by the expiration, end or other determination of any limited estate of fee-simple, or of any fee-tail or other particular estate, hath or ought to have first fallen or become in possession, or which shall or may or ought hereafter first to fall or come in possession, within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof; nor of, for or from any right or title first accrued or grown to his Majesty, or any of his progenitors, predecessors or ancestors, or which shall first accrue or grow to his Majesty, or any of his heirs or successors, of, in or to any manors, lands, tenements, rents, tithes or hereditaments, at any time or times within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission or other suit or proceeding as shall at any

time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof, and not before.

IV. Provided also, and be it enacted by authority of the present parliament, That this act, or any thing therein contained, shall not extend to any manors, lands, tenements, rents, tithes or hereditaments, mentioned to be granted or conveyed by any of his Majesty's progenitors, predecessors or ancestors, or by any other under whom his Majesty claimeth, to any person or persons, of any limited estate in fee-simple, or of any estate in tail, or other particular estate, which several estates (if the same had been good and effectual in law), have or ought to have first fallen or become in possession, or will or ought first to fall or come in possession, within the space of sixty years next before the filing, issuing or commencing, of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof as aforesaid; nor to any manors, lands, tenements, rents, tithes or hereditaments, mentioned to be granted or conveyed by any of his Majesty's progenitors, predecessors or ancestors, or by any other under whom his Majesty claimeth, to any person or persons in fee-tail, or other particular estate, whereof the reversion or inheritance (if such estate tail, or other particular estate, had been good and effectual in law) should have been and continued in his Majesty, or any of his progenitors, predecessors or ancestors, or should or ought hereafter to be and continue in his Majesty, his heirs or successors, at any time within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof as aforesaid.

Limitation of the act with respect to grants from the Crown of any limited estate, &c.

V. Provided also, and be it enacted by the authority of this present parliament, That all and singular the said manors, lands, tenements and hereditaments, shall at all times hereafter be holden of his Majesty, his heirs and successors, and of other person and persons, bodies politic and corporate, their heirs and successors respectively, by the same tenures, services, fee-farms, chief rents, heriots and other duties, to all intents and purposes as the same should or ought of right to have been holden if the estates, rights and interests, established and made sure by this present act had been, before the making of this act, firm, good, and effectual in law.

The said manors, &c. to be holden of the Crown upon the usual tenures, services and duties.

VI. Saving to every person and persons, bodies politic and corporate, their heirs and successors (other than his most excellent Majesty, his heirs and successors, and other than all patentees or grantees of concealments or defective titles, and all and every person or persons claiming from, by or under them, or any of them, for or in respect or by reason of any such patents or grants of concealments or defective titles) all such rights, title, interest, estate, rents, commons, customs, duties, profits and other claims and demands whatsoever, in, to or out of the said manors, lands, tenements, tithes or hereditaments, as they or any of them had or ought to have had before the making of this act; any thing in this act to the contrary notwithstanding.

General reservation of rights.

Provision for securing to the Crown such fee farm or other rents, &c., as have been paid within a limited time.

Right under any grant from the Crown of any manors, &c. made before 1st Jan., 1769, not prejudiced by this act,

—If prosecuted within a year.

Right of the Crown to any lands, &c. within the manor of East Greenwich, or district of the Savoy,

—not prejudiced,

—If prosecuted within two years.

Provision declaring what shall or shall not be deemed a putting in charge, standing insuper, or taking or answering by or to the Crown, &c.

VII. Provided also, and be it enacted, That where any fee farm rent, or other rent or rents have been or shall be answered and actually paid to the King's Majesty, or to any his predecessors, heirs or successors, within the space of sixty years next before an action, bill, plaint, information, commission or other suit or proceeding shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof, out of any manors, lands, tenements or hereditaments, of which manors, lands, tenements or hereditaments, the estates, rights or interests being defective, are established, and made sure by this present act, that the King's Majesty, his heirs and successors, shall from henceforth for ever have, hold and enjoy the said rents, and arrearages thereof, in such manner and form, and as fully and amply, as the same are or were enjoyed at any time within the said space of sixty years.

VIII. Provided always, and be it enacted, That nothing in this act contained shall extend or be prejudicial to the right, title or claim of any person or persons in or to any manors, lands, tenements or hereditaments, by virtue of or under any grant or grants, letters patent or letters patents, from any of his Majesty's progenitors, ancestors or predecessors, or by virtue of or under any grant or grants, letters patent or letters patents, from his Majesty, made or passed before the first day of January, one thousand seven hundred and sixty-nine; so as such right, title or claim, be prosecuted with effect by bill, plaint, information or other suit or proceeding, in some of his Majesty's Courts of Record at Westminster, within the space of one year from the first day of January, one thousand seven hundred and sixty-nine.

IX. Provided always, and be it enacted, That nothing in this act contained shall extend or be prejudicial to any right, title or claim, which his Majesty now hath to any lands, tenements or hereditaments, within the manor of East Greenwich, in the county of Kent: or to any messuages, lands, tenements or hereditaments, within the precinct, district or liberty commonly called the Savoy, in the county of Middlesex; or to any the manors, messuages, advowsons, buildings, lands, tenements, hereditaments and appurtenances, being the estate and possession of the late hospital of the Savoy, or of the master and chaplains of the said hospital: so as such right, title or claim, be prosecuted with effect by bill, plaint, information, or other suit or proceeding, in some of his Majesty's Courts of Record at Westminster, within the space of two years from the first day of January, one thousand seven hundred and sixty-nine.

X. Provided always, and be it enacted by the authority of this present parliament, That no putting in charge, nor standing insuper, nor taking or answering the farm rents, revenues or profits of any of the said manors, lands, tenements or hereditaments, by force, colour or pretext of any letters patent or grants of concealments, or defective titles, or of manors, lands, tenements or hereditaments, out of charge, or by force, colour or pretext, of any inquisitions, presentments, by or by reason of any commission or other authority to find out concealments, defective titles or lands, tenements or hereditaments out of charge, shall be deemed, construed or taken to be a putting in charge, standing insuper, or taking or answering the farm rents, revenues or profits by or to his Majesty, or any of his progenitors or predecessors, heirs or successors; unless there-

upon such manors, lands, tenements or hereditaments, have been or shall be, upon some information or suit, on the behalf of his Majesty, or some of his progenitors or predecessors, heirs or successors, upon a lawful verdict given or to be given, or demurrer in law adjudged, or upon a hearing, ordered or decreed for his Majesty, or some of his progenitors or predecessors, heirs or successors, or some of them, within the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceedings as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof as aforesaid.

48 GEO. 3, C. 47.

An Act for quieting Possessions and confirming defective Titles in Ireland, and limiting the Right of the Crown to sue in manner therein mentioned ; and for the Relief of Incumbents in respect of Arrears due to the Crown, during the Incumbency of their Predecessors. [27th May, 1808.]

WHEREAS by an act, passed in the ninth year of his present Majesty's reign, intituled, "An Act to amend and render more effectual an Act made in the twenty-first year of the reign of King James the First, intituled, 'An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever,'" it was enacted, that the king's Majesty, his heirs and successors, should not implead for any manors, lands, or hereditaments whereon the right to such lands, manors or hereditaments did not or should not have accrued within sixty years next before the commencement of any suits instituted in respect of the same : and whereas it is expedient to limit in like manner the right and title of his Majesty, his heirs and successors, in and to all manors, lands, tenements, rents, tithes and hereditaments (except liberties and franchises) in Ireland to sixty years next before the commencement of any suit or proceeding for the same, and to secure to all his Majesty's subjects the free and quiet enjoyment of all manors, lands, tenements, rents, tithes, and hereditaments which they or those under whom they claim respectively have held or enjoyed, or whereof they have taken the rents, revenues, issues or profits, for the space of sixty years next before the commencement of any suit or proceeding for the same ; wherefore be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the king's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question or implead any person or persons, bodies politic or corporate in Ireland, for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises) or for

Brit. Act, 9 Geo. 3,
c. 15, amending
21 Jac. 1, c. 2.

His Majesty shall
not sue (in Ire-
land) for any
estate when the
right hath not
accrued, nor shall
first accrue, within

sixty years before the commencement of such suit.

The subject quieted on possession of sixty years.

or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge or demand of, in, or to the same or any of them, by reason of any right or title which hath not first accrued or grown, or which shall not hereafter first accrue or grow within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been in the actual seisin thereof, or have or shall have been answered by force and virtue of any right or title to the same, the rents, revenues, issues, or profits thereof, or the rents, issues, or profits of any honors, manors, or other hereditaments, whereof the premises in question shall be part or parcel, within the said space of sixty years, or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, within the said space of sixty years: and that all and every person or persons, bodies politic and corporate, their heirs and assigns, and all claiming by, from, or under them or any of them, for and according to their and every of their several estates and interests which they have or claim to have, or shall or may have or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold, and enjoy, against his Majesty, his heirs and successors, claiming by any title which hath not first accrued or grown, or which shall not hereafter first accrue or grow within the said space of sixty years, all and singular manors, lands, tenements, rents, tithes and hereditaments whatsoever (except liberties and franchises) which he or they, or his or their or any of their ancestors or predecessors, or those from, by or under whom they do or shall claim, or shall have held or enjoyed or taken the rents, revenues, issues or profits thereof by the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, by, from, or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim is the said manors, lands, tenements, rents, tithes, or hereditaments, by force of any right or title have or shall have been in the actual seisin thereof, or have been or shall have been answered by virtue of any such right or title, the rents, revenues, issues, or other profits thereof, within the said space of sixty years, or that the same have or shall have been duly in charge as aforesaid within the said space of sixty years.

In what cases the rents and profits of estates shall be deemed in charge.

II. Provided always, and be it enacted, That where the rents, revenues, issues or profits of any manors, lands, tenements, tithes or hereditaments are or shall be in charge, by, to, or with any auditor or auditors, or proper officer or officers of the revenue, such

rents, revenues, issues and profits shall be held, deemed and taken to be duly in charge within the intent and meaning of this act; any usage or custom to the contrary notwithstanding.

III. Provided always, That this act or any thing herein contained shall not extend to bar, impeach, or hinder his Majesty, his heirs or successors, of, for, or from any manors, tenements, rents, tithes, or hereditaments, whereof any reversion or remainder now is in his Majesty, for or concerning the said reversion or remainder, nor of, for, or from any reversion or remainder or possibility of reversion or remainder in any of his Majesty's progenitors, predecessors or ancestors, which by the expiration, end, or other determination of any limited estate of fee simple, or of any fee tail or other particular estate, hath or ought to have first fallen or become in possession, or which shall or may or ought hereafter first to fall or come in possession within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding, or shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof; nor of, for, or from any right or title first accrued or grown to his Majesty, or any of his progenitors, predecessors or ancestors, or which shall first accrue or grow to his Majesty, or any of his heirs or successors, of, in, or to any manors, lands, tenements, rents, tithes or hereditaments, at any time or times within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same or in respect thereof, and not before.

Reversions or remainders in the Crown of any lands shall not be impeached by this act till sixty years after the determination of the particular estate.

IV. Provided also, and be it enacted, That all and singular the said manors, lands, tenements, tithes and hereditaments, shall at all times hereafter be holden of his Majesty, his heirs and successors, and of other person or persons, bodies politic and corporate, their heirs and successors respectively, by the same tenures, services, fee farms, chief rents, quit rents, heriots, and other duties, to all intents and purposes as the same should or ought of right to have been holden if the estates, rights and interests established and made sure by this present act had been before the making of this act firm and effectual in law: saving to every person and persons, bodies politic and corporate, their heirs and successors (other than his most excellent Majesty, his heirs and successors) all such rights, title, interest, estate, rents, commons, customs, duties, profits, and other claims and demands whatsoever, into or out of the said manors, lands, tenements, tithes or hereditaments, as they or any of them had or ought to have had before the passing of this act; any thing in this act to the contrary notwithstanding.

Lands shall be holden of the Crown upon the usual tenures, services, and duties.

V. Provided also, and be it enacted, That where any fee farm rent, or other rent or rents have been or shall be answered and actually paid to the king's Majesty, or to any of his predecessors, heirs or successors, within the space of sixty years next before any action, bill, plaint, information, commission, or other suit or proceeding shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof, out of any manors, lands, tenements, tithes, or hereditaments, of which manors, lands, tenements, tithes, or hereditaments, the estates, rights or interests

Where rents shall be paid to the King within sixty years, they shall remain payable.

being defective, are established and made sure by this present act, that his Majesty, his heirs and successors, shall from henceforth for ever have, hold, and enjoy the said rents and arrearages thereof in such manner and form and as fully and as amply as the same are or were enjoyed at any time within the said space of sixty years.

Incumbents of benefices shall not be liable to arrears of Crown rents accrued before their incumbency.

VI. And be it further enacted, That in all cases where any rents or other dues in the nature or lieu of rents now are or shall hereafter become due and payable to his Majesty, his heirs and successors, out of or chargeable upon any rectories, vicarages, curacies or other ecclesiastical benefices, or payable by the rectors, vicars, curates, or other ecclesiastical persons, the incumbents thereof respectively having respectively actual cure of souls, such rectors, vicars, curates, or other ecclesiastical persons, or any of them, shall not be subject or liable to or compellable to pay or satisfy to his Majesty, his heirs or successors, any arrear or arrears of such rent or rents, or other dues which shall have accrued or shall hereafter accrue due and payable before the accruing of the title of such rector, vicar, curate or other ecclesiastical person to such rectories, vicarages, curacies or other ecclesiastical benefices aforesaid; and that no distress, action, suit or other proceeding whatsoever shall be made, brought, commenced or prosecuted against any such rector, vicar, curate, or other ecclesiastical person during his life, or against his lands, tenements, goods or chattels after his death, for any such arrear or any part thereof.

7 & 8 VICT. c. 105.

An Act to confirm and enfranchise the Estates of the conventional Tenants of the ancient assessionable Manors of the Duchy of Cornwall, and to quiet Titles within the County of Cornwall as against the Duchy; and for other Purposes.

[9th August, 1844.]

The claims of the Duke of Cornwall generally to be barred by the lapse of sixty years.

LXXI. And be it enacted, That the Duke of Cornwall shall not at any time hereafter sue, impeach, question, or implead any person for or in anywise concerning any lands, manors, tenements, rents, tithes, or hereditaments whatsoever situate, issuing, or arising in the county of Cornwall (other than liberties or franchises, and other than mines, minerals, stone, or substrata), or for or in anywise concerning the revenues, issues, and profits thereof, or make any title, claim, challenge, or demand of, on, or to the same or any of them (except as aforesaid), by reason of any right or title which hath not first accrued or grown, or which shall not have first accrued or grown, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless

the Duke of Cornwall, or some other person under whom the Duke of Cornwall any thing hath or lawfully claimeth, or shall hereafter have or lawfully claim, in the said manors, lands, tenements, rents, tithes, or hereditaments, by force of any right or title, hath or shall have been answered by force and virtue of any such right or title to the same, the rents, revenues, issues, or profits thereof, within the said space of sixty years, or that the same have or shall have been duly in charge to the Duke of Cornwall, or have or shall have stood insuper of record within the space of sixty years; and that all persons, for and according to their and every of their several estates and interests which they have or claim to have, or shall or may have or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold, and enjoy against the Duke of Cornwall claiming any title which hath not first accrued on grown within the said space of sixty years, all and singular manors, lands, tenements, rents, tithes, and hereditaments whatsoever, situate, issuing or arising in the county of Cornwall (except as aforesaid), which they, or their or any of their ancestors or predecessors, or those from whom, by or under whom, they do or shall claim, have or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless the Duke of Cornwall, or some other person under whom the Duke of Cornwall any thing hath or lawfully claimeth, or shall have or lawfully claim, in the said manors, lands, tenements, rents, tithes, or hereditaments, by force of any right or title, hath been or shall have been answered by virtue of any such right or title, the rents, revenues, issues, or profits thereof, within the said space of sixty years, or that the same have or shall have been duly in charge, or stood insuper of record as aforesaid, within the said space of sixty years.

LXXII. Provided always, and be it enacted, That the Duke of Cornwall, or any person under whom the Duke of Cornwall hath or lawfully claimeth, or shall hereafter have or lawfully claim as aforesaid, shall not be deemed, for the purposes of this act, to have been answered by force or virtue of any such right or title, the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes or hereditaments which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits shall have been taken, by any other person by the space of sixty years next before the filing, issuing, or commencing of any such action, suit, bill, plaint, information, commission, or other suit or proceeding for recovering the same, or in respect thereof, by reason of the same having been part or parcel of any honour or manor or other hereditament of which the rents, revenues, issues, or profits shall have been answered to the Duke of Cornwall, or any other person under whom the Duke of Cornwall hath or lawfully claimeth, or shall hereafter have or lawfully claim as aforesaid, or which honour or manor or other hereditament shall have been duly in charge to the Duke of Cornwall, or to or with any officer of the Duchy of Cornwall, or stood insuper of record as aforesaid.

LXXIII. And be it enacted, That the Duke of Cornwall shall

The claims of the Duke not to be kept alive by putting a manor in charge, of which the land shall be part.

Claims of the Duke of Cornwall

to mines to be barred by the possession of the land and exclusively working the mines for sixty years ;

not sue, impeach, question, or implead any person for or in anywise concerning any mines, minerals, stone, or substrata in, upon, under, or of any lands, manors, tenements, or hereditaments whatsoever situate in the county of Cornwall, where such lands, manors, tenements, or hereditaments shall have been held or enjoyed by such person, or any person by, through, or under whom he claims, or any person whomsoever other than the Duke of Cornwall, or any person claiming under him, for a period of sixty years or more before the filing, issuing, or commencing any action, bill, plaint, information, commission, or other suit or proceeding in respect of such mines, minerals, stone, or substrata, without interruption or disturbance by the Duke of Cornwall, or any person claiming under him, and where such mines, minerals, stone, or substrata have been substantially worked and gotten at any time during the said period by the person who has so held and enjoyed the said lands, manors, tenements, or hereditaments, and such mines, minerals, stone, or substrata have not been at any time during the said period of sixty years worked and gotten, or the tolls, dues, royalties, and other profits thereof received or enjoyed, by the Duke of Cornwall or some person claiming under him.

—or by the possession of the land for one hundred years.

LXXIV. And be it enacted, that the Duke of Cornwall shall not sue, impeach, question, or implead any person for or in anywise concerning any mines, minerals, stone, or substrata in, upon, under, or of any lands, manors, tenements, or hereditaments whatsoever situate in the county of Cornwall, where such lands, manors, tenements, or hereditaments shall have been held or enjoyed by such person, or any person by, through, or under whom he claims, or any person whomsoever other than the Duke of Cornwall, or any person claiming under him, for a period of one hundred years before the filing, issuing, or commencing any action, bill, plaint, information, commission, or other suit or proceeding in respect of such mines, minerals, stones, or substrata, without interruption or disturbance by the Duke of Cornwall, or any person claiming under him, and where such mines, minerals, stones, or substrata shall not have been at any time during the said period of one hundred years worked and gotten, or the tolls, dues, royalties, or other profits thereof received or enjoyed, by the Duke of Cornwall or some person claiming under him.

Rents, &c. in charge with the proper officer to be deemed in charge.

LXXV. Provided always, and be it enacted, That where the rents, revenues, issues, or profits of any manors, lands, tenements, tithes, or hereditaments are or shall be duly in charge by, to, or with any proper officer of the Duchy of Cornwall, such rents, revenues, issues, and profits shall be held, deemed, and taken to be duly in charge within the meaning and intent of this act, any usage or custom to the contrary notwithstanding.

Time as to reversions not to begin to run till they fall into possession ;

LXXVI. Provided always, and be it enacted, That this act, or any thing herein contained, shall not extend to bar, impeach, or hinder the Duke of Cornwall of, for, or from any manors, tenements, rents, tithes, or hereditaments whereof any reversion or remainder now is in his royal highness Albert Edward now Duke of Cornwall, for or concerning the said reversion or remainder, nor of, for, or from any reversion or remainder, or possibility of reversion or remainder, in any of his said royal highness's progenitors, predecessors or ancestors for the time being entitled to the

revenues of the said duchy, which by the expiration, end, or other determination of any limited estate has or ought to have fallen or become in possession, or which shall or may or ought hereafter first to fall or come in possession, within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, nor of, for, or from any right or title first accrued or grown to the Duke of Cornwall, or which shall first accrue or grow to the Duke of Cornwall, of, in, or to any manors, lands, tenements, rents, tithes, or hereditaments at any time or times within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, and not before.

LXXVII. Provided also, and be it enacted, That this act or any thing herein contained shall not extend to any manors, lands, tenements, rents, tithes, or hereditaments mentioned to be granted or conveyed by the Duke of Cornwall, or by any other under whom the Duke of Cornwall claimeth, to any person or persons for any limited estate in fee simple or any estate in tail or other particular estate, which several estates (if the same had been good and effectual in law) have or ought to have first fallen or become in possession, or will or ought first to fall or come in possession, within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof as aforesaid, nor to any manors, lands, tenements, rents, tithes, or hereditaments mentioned to be granted or conveyed by any of the predecessors, progenitors, or ancestors of his said royal highness Albert Edward Duke of Cornwall for the time being entitled to the revenues of the said Duchy of Cornwall, or by any other under whom his said royal highness claimeth, to any person or persons in fee tail or other particular estate, whereof the reversion or inheritance (if such estate tail or other particular estate had been good and effectual in law) should have been and continued in his said royal highness, or should or ought hereafter to be and continue in the Duke of Cornwall, at any time within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof as aforesaid.

LXXXVII. Provided always, and be it enacted, That this act or any thing herein contained shall in no wise alter or affect the operation, extent, or construction of an act made and passed in the session holden in the second and third years of the reign of his late majesty King William the Fourth, intituled "An Act for shortening the Time required in Claims of Modus decimandi, or Exemption from or Discharge of Tithes," or any thing therein contained.

—nor to hereditaments which have been granted for limited estates till such estates fall.

Act not to affect the act of 3 & 3 Will. 4, c. 100.

Provisions for limitations of actions, &c. to apply only to lands, &c. in Cornwall.

LXXXVIII. Provided always, and be it enacted and declared, That the provisions herein-before contained for the limitation of actions and suits, and the several other provisions, matters, and things herein contained, shall apply only to lands, manors, tenements, rents, tithes, mines, minerals, stone, substrata, hereditaments, and other things situate, issuing, arising, or being in the county of Cornwall.

21 & 22 VICT. C. 109.

An Act to declare and define the respective Rights of Her Majesty and of His Royal Highness the Prince of Wales and Duke of Cornwall to the Mines and Minerals in or under Land lying below High-water Mark, within and adjacent to the County of Cornwall, and for other Purposes.

[2d August, 1858.]

All minerals under the seashore and other places below high-water mark in Cornwall are vested in his Royal Highness the Prince of Wales and Duke of Cornwall.

I. All mines and minerals lying under the seashore between high and low water marks within the said county of Cornwall, and under estuaries and tidal rivers and other places (below high-water mark), even below low-water mark, being in and part of the said county, are, as between the Queen's Majesty in right of her Crown on the one hand, and his royal Highness Albert Edward Prince of Wales and Duke of Cornwall in right of his Duchy of Cornwall on the other hand, vested in his said Royal Highness Albert Edward Prince of Wales and Duke of Cornwall in right of the Duchy of Cornwall as part of the soil and territorial possessions of the said duchy; but this declaration is not to extend to the mines and minerals in or under land below high-water mark which is part and parcel of any manor belonging to her Majesty in right of her Crown.

All minerals below low-water mark adjacent to the county of Cornwall are vested in the Queen in right of her Crown.

II. All mines and minerals lying below low-water mark under the open sea, adjacent to but not being part of the county of Cornwall, are, as between the Queen's Majesty in right of her Crown on the one hand, and his royal Highness Albert Edward Prince of Wales and Duke of Cornwall in right of his Duchy of Cornwall on the other hand, vested in her Majesty the Queen in right of her Crown, as part of the soil and territorial possessions of the Crown.

Interpretation of terms.

VIII. In this act the following expressions and words shall have the several meanings hereby assigned to them, unless there is something in the context repugnant to such construction; the expressions "Duke of Cornwall" and "Duke of Cornwall for the time being" shall comprehend the personage for the time being entitled to the revenues of the Duchy of Cornwall, and shall include her Majesty, her heirs and successors, when there may be no

Duke of Cornwall; the expression "mines and minerals" shall comprehend all mines and minerals, and all quarries, veins, or beds of stone, and all substrata of any other nature whatsoever, and the ground and soil in, upon, and under which such mines and minerals, quarries, veins, or beds of stone, and other substrata lie; and the words "the county of Cornwall" shall mean the said county exclusive of any lands added thereto or taken therefrom by an act passed in the seventh and eighth years of the reign of her present Majesty, chapter sixty-one.

23 & 24 VICT. C. 53.

An Act for the Limitation of Actions and Suits by the Duke of Cornwall in relation to Real Property, and for authorizing certain Leases of Possessions of the Duchy. [23d July, 1860.]

I. All the provisions of the said act of the ninth year of King George the Third now applicable to her Majesty, her heirs and successors, shall extend and be applicable to the Duke of Cornwall, in like manner as if the same were re-enacted and the Duke of Cornwall were throughout mentioned or referred to where the "king's Majesty" or "his Majesty" is in the said act mentioned or referred to, subject nevertheless, as to the property and possessions included in this act, to the provisions contained in sections seventy-two and seventy-five of the act of the seventh and eighth years of her Majesty above referred to with respect to the property and possessions included therein.

Provisions of 9 Geo. 3, c. 16, as to limitations of actions and suits to extend to the Duke of Cornwall.

II. Provided always, That nothing hereinbefore contained shall extend to the property or possessions in relation to which provision for the limitation of actions and suits and for quieting titles is made by the said act of the seventh and eighth years of her Majesty, or affect the provisions of the act of the session holden in the second and third years of his late Majesty, chapter seventy-one, "for shortening the time of prescription in certain cases," or of the act of the same session of parliament, chapter one hundred, "for shortening the time required in claims of modus decimandi or exemption from or discharge of tithes."

Nothing to affect provisions of 7 & 8 Vict. c. 105, 2 & 3 Will. 4, c. 71, and 2 & 3 Will. 4, c. 100.

IV. In the construction of this act the expression "the Duke of Cornwall" shall include as well his royal Highness Albert Edward now Duke of Cornwall as his predecessors and successors Dukes of Cornwall, and also the Queen's most excellent Majesty and her predecessors and successors, Kings and Queens of England, for the time being entitled to the lands and possessions of the Duchy of Cornwall or the revenues thereof during a vacancy of the Duchy of Cornwall.

Construction of the expression "Duke of Cornwall."

24 & 25 VICT. C. 62.

An Act to amend the Act of the Ninth Year of King George the Third, Chapter Sixteen, for quieting Possessions and Titles against the Crown, and also certain Acts for the like Object relating to Suits by the Duke of Cornwall.

[1st August, 1861.]

WHEREAS by an act passed in the ninth year of King George the Third, chapter sixteen, provision is made for limiting the right of the King's Majesty to sue and implead any person for or concerning lands and hereditaments, or the rents, issues, or profits thereof, and for quieting possessions and titles against the Crown: And whereas the good purpose of that act has not been fully obtained by reason of the provisions therein relating to lands and hereditaments which have been in charge to her Majesty or have stood insuper of record, and also by reason of certain provisions therein relating to lands and hereditaments part or parcel of honours, manors, or other hereditaments: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

The Crown not to sue after sixty years by reason of lands having been in charge, &c.

1. The Queen's Majesty, her heirs and successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises) which such person or persons, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have, or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof, have or shall have been in charge to her Majesty or her predecessors or successors, or stood insuper of record, within the said space of sixty years, but that such having been in charge and such standing insuper of record shall be as against such person and persons, and all claiming by, from, or under them or any of them, of no force and effect.

Provisions of this act to apply to actions by the Duke of Cornwall, and to provisions of 7 & 8 Vict. c. 106, and 23 & 24 Vict. c. 63.

2. And whereas an act was passed in the session held in the seventh and eighth years of her Majesty, chapter one hundred and five, "for quieting titles within the county of Cornwall as against the Duchy of Cornwall, and other purposes:" And whereas another act was passed in the session held in the twenty-third and twenty-fourth years of her Majesty, chapter fifty-three, "for the limitation of actions and suits by the Duke of Cornwall in relation to real

property, and for other purposes:" And whereas it is expedient that the limitation applicable to actions and suits by the Crown should be made applicable to actions and suits by the Duke of Cornwall: Be it enacted, That the provisions of this act hereinbefore contained applicable to the Queen's Majesty shall extend and be applicable to the Duke of Cornwall, and to the said two last-recited acts, in the same manner as if the Duke of Cornwall were hereinbefore mentioned or referred to where the Queen's Majesty is mentioned or referred to; and this act shall be construed together with and be deemed to form part of the said two last-recited acts.

3. The Queen's Majesty, her predecessors and successors, shall not be held, deemed, or taken, for the purposes of the said act of the ninth year of King George the Third, to have been answered the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits shall have been taken, by any other persons or person, by the space of sixty years next before the filing, issuing, or commencing of any such action, suit, bill, plaint, information, commission, or other suit or proceeding for recovering the same or in respect thereof, as in the said act is mentioned, by reason only of the same lands, manors, tenements, rents, tithes, or hereditaments having been part or parcel of any honour or manor or other hereditaments of which the rents, revenues, issues, or profits shall have been answered to her Majesty or her predecessors or successors, or some other person under whom her Majesty hath or lawfully claimeth or shall hereafter have or lawfully claim as aforesaid, or of any honour, manor, or other hereditaments which shall have been duly in charge to her Majesty, her predecessors or successors, or stood insuper of record as aforesaid.

Provision as to the answering of rent, &c. to the Crown.

4. In the construction of the said act of the ninth year of King George the Third and of this act the right or title of the Queen's Majesty, her heirs or successors, or of the Duke of Cornwall, to any manors, lands, tenements, rents, tithes, or hereditaments which are now or shall at any time hereafter be subject to or comprised in any demise or lease for any term or terms of years, or for any life or lives, granted by or on behalf of her Majesty, or any of her royal predecessors or successors, or the Duke of Cornwall, shall not be deemed to have first accrued or grown until the expiration or determination of such demise or lease as against any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have commenced during the term of such demise or lease, or who shall claim from, by, or under any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have so commenced as aforesaid.

Preserving right to reversionary interests.

5. Nothing contained in this act shall extend to any action, bill, plaint, information, commission, or other suit or proceeding instituted or commenced before the passing of this act and now pending.

Act not to apply to existing suits.

2 & 3 WILL. 4, C. 71.

An Act for shortening the Time of Prescription in certain Cases.
[1st August, 1832.]

Claims to right of common and other profits à prendre, not to be defeated after thirty years' enjoyment by showing the commencement;

—after sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

In claims of right of way or other easement, the periods to be twenty years and forty years.

WHEREAS the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall. or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

II. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed abso-

lute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

III. And be it further enacted, That when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

IV. And be it further enacted, That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

V. And be it further enacted, That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

VI. And be it further enacted, That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

VII. Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

Before-mentioned periods to be deemed those next before suits for claims to which such periods relate.

In actions on the case the claimant may allege his right generally, as at present.

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

Restricting the presumption to be allowed in support of claims herein provided for.

Proviso for infants, &c.

action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What time to be excluded in computing the term of forty years appointed by this act.

VIII. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

Not to extend to Scotland or Ireland.

IX. And be it further enacted, That this act shall not extend to Scotland or Ireland.

Commencement of act.

X. And be it further enacted, That this act shall commence and take effect on the first day of Michaelmas Term now next ensuing.

Act may be amended.

XI. And be it further enacted, That this act may be amended, altered, or repealed during this present session of parliament.

2 & 3 WILL. 4, c. 100.

An Act for shortening the Time required in Claims of Modus decimandi, or Exemption from or Discharge of Tithes. [9th August, 1832.]

What prescriptions and claims of modus decimandi to be valid in law.

WHEREAS the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a modus decimandi, the payment or render of such modus, and, in cases of claim to exemption or discharge, showing the enjoyment of the land, without payment or render of

tithe, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of *modus* made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of *modus* made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing.

Providio.

II. And be it further enacted, That every composition for tithes which hath been made or confirmed by the decree of any court of equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge shall be deemed to be within the provisions of this act, unless such *modus*, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act.

What compositions for tithes shall be considered valid.

III. Provided always, That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of parliament, or within one year from the end thereof.

The act not available in any suit now commenced, &c.

To what cases
this act shall not
extend.

IV. Provided also, and be it further enacted, That this act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term for life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition.

Time during
which lands shall
be held by persons
entitled to the
tithes thereof to
be excluded in the
computation
under this act ;

V. Provided also, and be it further enacted, That where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned.

—as also the time
during which any
person capable of
resisting any
claim shall be an
infant, &c.

VI. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What it shall be
sufficient to allege
in actions com-
menced under
this act.

VII. And be it further enacted, That in all actions and suits to be commenced after this act shall take effect it shall be sufficient to allege that the modus or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

No presumption
allowed in sup-
port of any claim
for any less period
than mentioned in
this act.

VIII. And be it further enacted, That in the several cases mentioned in and provided for by this act no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

Act to extend to
England only.

IX. Provided also, and be it further enacted, That this act shall not extend to Scotland or Ireland.

3 & 4 WILL. 4, C. 27.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

[24th July, 1833.]

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Meaning of the words in the act.

"Land."

"Rent."

Person through whom another claims.

"Person."

Number and gender.

No land or rent to be recovered but within twenty years after the right of action accrued to the claimant or some person whose estate he claims.

II. And be it further enacted, That after the thirty-first day of December one thousand eight hundred and thirty-three no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

III. And be it further enacted, That in the construction of this act the right to make an entry or distress or bring an action to

When the right shall be deemed to have accrued :

- recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.
- in the case of an estate in possession;
 —on dispossession;
 —on abatement or death;
 —on alienation;
 —in case of future estate;
 —in case of forfeiture or breach of condition.

Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

Reversioner to have a new right.

IV. Provided always, That when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

V. Provided also, That a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or

such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined have been in possession or receipt of the profits of such land, or in receipt of such rent.

VI. And be it further enacted, That for the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

An administrator to claim as if he obtained the estate without interval after death of deceased.

VII. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

In the case of a tenant at will the right shall be deemed to have accrued at the end of one year.

VIII. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

IX. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Where rent amounting to 20s., reserved by a lease in writing, shall have been wrongfully received on, right to accrue on the determination of the lease.

X. And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

A mere entry not to be deemed possession.

XI. And be it further enacted, That no continual or other claim

No right to be

preserved by continual claim.

Possession of one coparcener, &c. not to be the possession of the others.

Possession of a younger brother not to be the possession of the heir.

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the termination of their disability or death;

upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

XII. And be it further enacted, That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

XIII. And be it further enacted, That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

XIV. Provided always, and be it further enacted, That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

XV. Provided also, and be it further enacted, That when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act.

XVI. Provided always, and be it further enacted, That if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have

accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

XVII. Provided nevertheless, and be it further enacted, That no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

—but no action, &c. shall be brought beyond forty years after the right of action accrued.

XVIII. Provided always, and be it further enacted, That when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

No further time to be allowed for a succession of disabilities.

XIX. And be it further enacted, That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act.

Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

XX. And be it further enacted, That when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

XXI. And be it further enacted, That when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

Where tenant in tail is barred, remaindermen, whom he might have barred, shall not recover.

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

Where there shall have been possession under an assurance, by a tenant in tail, which shall not bar the remaindermen, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

In cases of fraud no time shall run whilst the fraud remains concealed.

XXII. And be it further enacted, That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

XXIII. And be it further enacted, That when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

XXIV. And be it further enacted, That after the said thirty first day of December one thousand eight hundred and thirty-three no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

XXV. Provided always, and be it further enacted, That when any land or rent shall be vested in a trustee upon any express trust, the right of the cestuique trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

XXVI. And be it further enacted, That in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which

such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.

XXVII. Provided always, and be it further enacted, That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this act.

XXVIII. And be it further enacted, That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years, or sixty years.

XXIX. Provided always, and be it further enacted, That it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December one thousand eight hundred and thirty-three no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

No advowson to be recovered but within three incumbencies or sixty years.

XXX. And be it further enacted, That after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

XXXI. Provided always, and be it further enacted, That when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

XXXII. And be it further enacted, That in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right

to bring any quare impedit, action or suit, shall be limited accordingly.

XXXIII. Provided always, and be it further enacted, That after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

No advowson to be recovered after 100 years.

XXXIV. And be it further enacted, That at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished.

At the end of the period of limitation the right of the party out of possession to be extinguished.

XXXV. And be it further enacted, That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

Receipt of rent to be deemed receipt of profits.

XXXVI. And be it further enacted, That no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisio, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præterit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of diaceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action, real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any

Real and mixed actions abolished after the 31st December, 1834;

—except for dower, quare impedit, and ejectment.

such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December one thousand eight hundred and thirty-four.

Real actions may be brought until the 1st June, 1836.

XXXVII. Provided always, and be it further enacted, That when, on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

Saving the rights of persons entitled to real actions only at the commencement of the act, &c.

XXXVIII. Provided also, and be it further enacted, That when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this Act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

No descent, warranty, &c. to bar a right of entry.

XXXIX. And be it further enacted, That no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December one thousand eight hundred and thirty-three shall toll or defeat any right of entry or action for the recovery of land.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meantime.

XL. And be it further enacted, That after the said thirty-first day of December one thousand eight hundred and thirty-three no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

No arrears of dower to be recovered for more than six years.

XLI. And be it further enacted, That after the said thirty-first day of December one thousand eight hundred and thirty-three no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

No arrears of rent or interest to be recovered for more than six years.

XLII. And be it further enacted, That after the said thirty-first day of December one thousand eight hundred and thirty-three no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of

any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

XLIII. And be it further enacted, That after the said thirty-first day of December one thousand eight hundred and thirty-three no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

Act to extend to the spiritual courts.

XLIV. Provided always, and be it further enacted, that this Act shall not extend to Scotland, and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

Act not to extend to Scotland, nor to advowsons in Ireland.

XLV. And be it further enacted, That this act may be amended, altered, or repealed during this present session of parliament.

Act may be amended.

1 VICT. C. 28.

An Act to amend an Act of the Third and Fourth Years of his late Majesty, for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.
[3d July, 1837.]

WHEREAS doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," so far as the same relates to mortgages; and it is expedient that such doubts should be removed: Be it declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That it shall and may be lawful for any person entitled to or claiming under any

3 & 4 WILL. 4, c. 27.

Mortgagees of land, being land within the def-

dition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years after last payment of principal or interest.

mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding.

6 & 7 VICT. C. 54.

An Act for extending to Ireland the Provisions not already in force there of an Act of the Third and Fourth Years of the Reign of the late King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," and to explain and amend the said Act. [10th August, 1843.]

3 & 4 WILL. 4, c. 27.

WHEREAS an act was passed in the session of parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," and thereby it was (after and amongst other things) enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three no person should bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice as the patron thereof, after the expiration of such period as thereafter is mentioned; (that is to say,) the period during which three clerks in succession should have held the same, all of whom should have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together should amount to the full period of sixty years, and if the times of such incumbencies should not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies would make up the full period of sixty years: Provided always, and it was thereby further enacted, that when, on the avoidance after a clerk should have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk should be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk should be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but that when a clerk should have been presented by his Majesty upon the avoidance of

a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk should for the purposes of that act be deemed a continuation of the incumbency of the clerk so made bishop; and by the said act it was further enacted, that in the construction thereof every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, should be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, should be limited accordingly: Provided always, and it was thereby further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person should bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, after the expiration of one hundred years from the time at which a clerk should have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk should subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title; and by the said act it was further enacted, that at the determination of the period limited by that act to any person for bringing any writ of quare impedit, or other action or suit, the right and title of such person to the advowson, for the recovery whereof such action or suit might have been brought within such period, should be extinguished: Provided always, and it was thereby further enacted, that that act should not, so far as it related to any right to present to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland: And whereas the hereinbefore in part recited act, save in so far as it relates to any such right as last aforesaid, is already in force in Ireland, and it is expedient to extend to Ireland the whole of the provisions of that act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That after the first day of January one thousand eight hundred and forty-four the several clauses and enactments in the said act passed in the session of parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth contained, and hereinbefore recited, relating to any right to present to or bestow any church, vicarage, or other ecclesiastical benefice (the clause thereof providing that the said act so far as it relates to any such right shall not extend to Ireland always excepted), shall extend and apply to Ireland, and that as fully and effectually as if the same clauses and enactments were here repeated, substituting for the said date of the thirty-first day of December one thousand eight hundred and thirty three the said date of the first day of January one thousand eight hundred and forty-four.

Provisions of
3 & 4 Will. 4, c. 27,
relating to ad-
vowsons, &c., ex-
tended to Ireland.

Certain words in those provisions to be similarly interpreted.

II. And whereas it was by the said recited act enacted, that the words and expressions therein mentioned, which in their ordinary signification have a more confined or a different meaning, should in that act, except where the nature of the provision or the context of the act should exclude such construction, be interpreted as therein follows; (that is to say,) that the person through whom another person is said to claim should mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor special or general, occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and that the word "person" should extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and that every word importing the singular number only should extend and be applied to several persons or things as well as one person or thing; and that every word importing the masculine gender only should extend and be applied to a female as well as a male; be it therefore further enacted, That the same words and expressions shall in this act be similarly interpreted, extended, and applied.

Removing doubts as to the periods limited for bringing any quare impedit or other action.

III. And whereas doubts have been entertained whether the several periods by the said act limited for bringing any quare impedit or other action, or any suit to enforce a right to present to, or bestow any ecclesiastical benefice as the patron thereof, apply to the case of a bishop claiming to have right to collate to or bestow any ecclesiastical benefice in his diocese, and it is expedient that all such doubts should be removed; be it therefore enacted, That the several periods limited by the said act or by this act for bringing any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a right as patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron to present to or bestow any ecclesiastical benefice: provided always, that nothing herein contained shall be deemed to affect the right of any bishop to collate to any ecclesiastical benefice by reason of lapse.

Provisions for the cases of Roman Catholic patrons who shall hereafter conform. 18 Car. 2 (I.)

IV. And whereas by an act passed in the Irish parliament in the session held in the seventeenth and eighteenth years of the reign of King Charles the Second, intituled "An Act for the explaining of some Doubts arising upon an Act, intituled 'An Act for the better Execution of His Majesty's gracious Declaration for the Settlement of his Kingdom of Ireland, and Satisfaction of the several Interests of Adventurers, Soldiers, and other His Subjects there;' and for making some Alterations and Additions unto the said Act for the more speedy and effectual Settlement of the said Kingdom," it was enacted, that certain advowsons and rights of patronage, and the rights of nomination, presentation, or collation to or donation of certain ecclesiastical benefices or promotions, which had been forfeited by certain Irish papists or popish recusants, should vest,

remain, and continue in his Majesty, his heirs and successors, until such Irish papist or popish recusant, or the right heir of such papist or recusant, should come to church, and receive the sacrament according to the rites of the church of England, and from and after such conformity should be again re-vested in the person so conforming and his heirs: and whereas by an act passed in the second year of the reign of her Majesty Queen Anne, intituled "An Act to prevent the further Growth of Popery," it was enacted, that where any papists, or persons professing the popish religion, did or should claim, enjoy, or possess any advowson or advowsons of churches, right of patronage or presentation to any ecclesiastical benefice, or where any protestant or protestants did or should hold, claim, enjoy, or possess any advowson or advowsons of churches, or right of patronage or presentation to any ecclesiastical benefice or benefices, in trust or for the use and benefit of any papist or papists whatsoever, that every such advowson, and right of patronage or presentation, should be thereby ipso facto vested in her Majesty, her heirs and successors, according to such estates as such papist had in the same, until such time as such papist, or the heir or heirs of such papist, should take a certain oath and subscribe a certain declaration and abjuration prescribed by and set forth in the said act, and should conform to the church of Ireland as by law established; be it enacted, That no possession under any presentation by the Crown, or collation by the ordinary, which may have taken place by reason of the said act of the eighteenth year of the reign of his Majesty King Charles the Second, or of the said act of the second year of the reign of her Majesty Queen Anne, during the nonconformity of any such patron professing the Roman Catholic religion, shall be deemed an adverse possession within the meaning of this act against the right of any such patron or his heirs, or any person claiming by, through, or under him or them; provided, that in all cases in which any patron shall have conformed to the said united church within sixty years before the passing of this act, or shall hereafter conform thereto, such patron, or any person claiming by, through, or under him, shall not be barred from bringing any such quare impedit, or other action or suit, for the purpose in the said first herein-recited act mentioned, before the expiration of sixty years, to commence and be computed from the day on which such patron shall have so conformed as aforesaid.

V. Provided always, and be it enacted, That this act shall not be prejudicial or available to or for any plaintiff or defendant in any action or suit already commenced, on or before the said first day of January one thousand eight hundred and forty-five to be commenced, relating to any right to present to or bestow any church, vicarage, or other ecclesiastical benefice in Ireland.

Act not to apply to suits commenced before 1st January, 1845.

23 & 24 VICT. C. 38.

An Act to further amend the Law of Property.

[Royal Assent 23rd July, 1860.]

13. Recites 3 & 4 Will. 4, c. 27, s. 40, and then enacts, That

after the 31st day of December, 1860, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one, was made or given.

3 & 4 WILL. 4, C. 42.

An Act for the further Amendment of the Law, and the better Advancement of Justice.

[14th August, 1833.]

Limitation of
action of debt on
specialties, &c.

III. And be it further enacted, That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.

Remedy for
infants, femmes
covert, &c.

IV. And be it further enacted, That if any person or persons that is or are or shall be entitled to any such action or suit, or to such

scire facias, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action is or are or shall be, at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

Absence of defendants beyond seas provided for.

V. Provided always, That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

Proviso in case of acknowledgment in writing, or by part payment.

[The corresponding enactments for *Ireland* are sections 20, 22, 23 of 16 & 17 Vict. c. 118, and in similar terms.]

19 & 20 VICT. C. 97.

An Act to amend the Laws of England and Ireland affecting Trade and Commerce.

[29th July, 1856.]

X. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first

Absence beyond seas or imprisonment of a creditor not to be a disability.

year of the reign of King James the First, chapter sixteen, section three, or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five, or by the acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one, and forty-two, and chapter forty-two, section three, or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

Judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

Part payment by one contractor, &c. not to prevent bar by certain statutes of limita-

XI. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

XII. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this act.

XIII. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

XIV. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section

three, and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators.

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